SUPREME COURT, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 399

UNITED STATES OF AMERICA,
Appellee,

versus

NEW ORLEANS INSURANCE EXCHANGE,
Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans Division.

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IN THE

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Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans Division.

JURISDICTIONAL STATEMENT.

(a) The Opinion and Decree by United States District Judge J. Skelly Wright in accordance with the Findings of Fact and Conclusions of Law, dated February 5, 1957, is reported at 148 F. Supp. 915. A copy of this Opinion and Decree is attached hereto as Appendix "A".

(b) The complaint charged the New Orleans Insurance Exchange with violations of Sections 1 and 2 of the Sherman Anti-Trust Act. The Final Judgment enjoined and restrained the New Orleans Insurance Exchange from continuing the activities charged in the complaint as being violative of Sections 1 and 2 of the Sherman Anti-Trust Act.

As the United States is complainant in this civil action brought in a district court of the United States under the Sherman Anti-Trust Act, this appeal from the final judgment is taken directly to the Supreme Court of the United States.

(i) This is a civil action seeking to enjoin the New Orleans Insurance Exchange and its respective members, named as co-conspirators, from the activities charged in the complaint as being violative of Sections 1 and 2 of the Sherman Anti-Trust Act. The text of Sections 1 and 2 of the Sherman Anti-Trust Act is attached hereto as Appendix "B".

(ii) The Final Judgment of United States District Judge J. Skelly Wright was dated March 19, 1957, and said Judgment was entered on March 19, 1957.

On March 29, 1957, appellant moved for a new trial or to amend and supplement Findings of Fact, Conclusions of Law and Judgment.

Appellant's Motion for a New Trial was denied by United States District Judge J. Skelly Wright on April 10, 1957.

Appellant's Notice of Appeal to the Supreme Court of the United States was filed on May 27, 1957 in the United States District Court for the Eastern District of Louisiana, New Orleans Division.

Appellant, on July 18, 1957, moved for an extension of time to docket the Appeal in the Supreme Court of the United States.

On July 22, 1957, United States District Judge Herbert Christenberry rendered an Order granting appellant through September 23, 1957 in which to file the record in the Supreme Court of the United States.

(iii) This appeal is taken pursuant to 15 U. S. C. A. Section 29 (Feb. 11, 1903, c. 544, Section 2, 32 Stat. 823; Mar. 3, 1911, c. 231, Section 291, 36 Stat. 1167; June 9, 1944, c. 239, 58 Stat. 272; June 25, 1948, c. 646, Section 17, 62 Stat. 989), providing that in every civil action brought in any district court of the United States under the Sherman Anti-Trust Act, as amended, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court. The text of the foregoing statute is attached hereto as Appendix "C".

(iv) In the case of *U. S. v. Oregon State Medical Society, et al.*, this Honorable Court allowed a direct appeal from the judgment of a United States district court in a case where the Government sought an injunction against violations of the Sherman Act. *United States of*

America v. Oregon State Medical Society, et al., Or. 1952, 72 S. Ct. 690, 343 U. S. 326, 96 L. Ed. 978.

See also:

United States of America v. Line Material Co., Wis. 1948, 68 S. Ct. 550, 333 U. S. 287, 92 L. Ed. 701.

And,

United States of America v. United States Gypsum Co., 1948, 68 S. Ct. 525, 333 U. S. 364, 92 L. Ed. 746, rehearing denied, 68 S. Ct. 788, 333 U. S. 869, 92 L. Ed. 1147.

(v) The text of the Sherman Anti-Trust Act of July 2, 1890, 15 U. S. C. A. Sections 1 and 2 is attached hereto as Appendix "B".

(c) (1) The following questions are presented by this appeal:

(A) Do the alleged activities of the New Orleans Insurance Exchange (a nontrading, nonprofit trade association of stock company fire and casualty insurance agents operating only in the Parishes of Orleans, Jefferson and St. Bernard, State of Louisiana) **involve interstate commerce,** so as to be subject to the provisions of Sections 1 and 2 of the Sherman Act, as amended; or **are the activities of the defendant beyond the scope of the Sherman Act,** as amended, in view of the fact that **insurance is not interstate commerce,** as held in *Paul v. Virginia*, 75 U. S. (8 Wall.) 168, 19 L. Ed. 357, and numerous subsequent decisions of the Supreme Court of the United States?

(B) If the business of insurance is interstate commerce, so as to give Congress the right, under the Commerce Clause of the United States Constitution to control the activities of the New Orleans Insurance Exchange, **has Congress delegated to the several states the right to govern and regulate the business of insurance, by adopting the McCarran Act,** 15 U. S. C. A. Sections 1011, 1012, 1013 (Mar. 9, 1945, c. 20, Secs. 1, 2, 3, 59 Stat. 34; July 25, 1947, c. 326, 61 Stat. 448).

(C) If, by adopting the McCarran Act, Congress has delegated to the several states the right to govern and regulate the business of insurance, **did the State of Louisiana adopt a comprehensive insurance code which completely regulates the business of insurance in Louisiana, with the result that the alleged activities of the defendant Insurance Exchange are controlled by the Louisiana Insurance Code rather than by the Sherman Act, as amended?**

(D) **Does the exception established by Section 3(b) of the McCarran Act have the effect of nullifying state control of the alleged acts of the defendant involving "boycott, coercion or intimidation",** so as to render the Sherman Act, as amended, applicable to the alleged activities of the New Orleans Insurance Exchange, and remove said activities from state control?

(E) **Do Sections 1 and 2 of the Sherman Act prohibit "boycott, coercion or intimidation",** or does the Sherman Act, on the contrary, prohibit **combinations in restraint of trade, monopolies, and attempts to restrain trade or monopolize commerce?** Stated differently, **does the exception in Sec. 3(b) of the McCarran Act create a new**

category of acts prohibited by the Sherman Act, namely "boycott, coercion, or intimidation"?

(F) If the Sherman Act, as amended, is applicable to the alleged activities of the defendant, **has the Government sustained its burden of proving the allegations of the complaint** with reference to the alleged combination in restraint of trade, monopoly, or attempts to combine or monopolize interstate commerce, particularly with reference to the alleged effect on (a) Insurance Companies, and (b) fire and casualty agents who are not members of the Exchange?

(G) **Did the trial judge improperly admit evidence of alleged activities which occurred long prior to the filing of the complaint,** where there was no indication that the alleged activities were continuing or threatened at the time the complaint was filed, or thereafter?

(H) **Did the trial judge improperly issue an injunction to restrain alleged activities which were neither occurring nor threatened at the time of the filing of the complaint or thereafter?**

(I) **Did the trial judge improperly permit the enlargement of the pleadings during the trial of the case, so as to admit evidence pertaining to surety business,** despite the fact that the complaint and all pretrial conferences were limited to allegations of alleged violations involving only **fire and casualty insurance, without any reference whatever to surety business?**

(J) If the alleged activities of the defendant involved or affected interstate commerce, was the interstate commerce substantial?

(K) If the activities of the New Orleans Insurance Exchange constituted a boycott, or refusal to deal, and if said activities are subject to the provisions of the Sherman Act, as amended, were the said activities **reasonable, within the "Rule of Reason" recognized by the Supreme Court of the United States?**

(d) The New Orleans Insurance Exchange, appellant, is a private association of one hundred thirty (130) insurance agents or agencies engaged in the casualty and surety insurance business in the New Orleans area, which is composed of Orleans, Jefferson, and St. Bernard Parishes. The complaint charged the New Orleans Insurance Exchange with violations of Sections 1 and 2 of the Sherman Anti-Trust Act. Specifically, the complaint charges that the Exchange and its members are engaging in an unlawful combination and conspiracy to restrain interstate commerce in insurance and to acquire a monopoly in its area of operation by maintaining a group boycott against all non-member insurance agencies as well as against all insurance companies which do not plant exclusively through Exchange outlets or members. The New Orleans Insurance Exchange denied that it unreasonably restrained trade or acquired a monopoly or conspired or attempted to do so, and it also denied that its members are engaged in interstate commerce. It further contended that the "*McCarran Act*", 15 U. S. C. A., Section 1013 (a) and (b) expressly excludes the business of insurance from the

operation of the federal antitrust laws. The text of the McCarran Act is attached hereto as Appendix "D".

(e) (Not applicable).

(f) Appellant respectfully submits that the statute cited in Paragraph (b) (i) herein, and the text of which is set forth in full in Appendix "C", expressly and exclusively confers jurisdiction on this Court.

This litigation raises the clear cut and serious question of whether, by the application of the Sherman Act, the Insurance Commissioners of the respective states are being deprived of their responsibility and authority for the taxing and regulation of the business of insurance, such responsibility and authority being expressly recognized by the Congress in the preamble of the "McCarran Act", and being specifically delegated, in the text of the Act, to the several states.

The construction placed by the Government and by the trial judge on a narrow exception contained in the McCarran Act is to nullify effect of the Act itself and defeat the express purpose of the Congress in delegating to the several states the right to regulate the business of insurance.

Appellant respectfully submits that the Federal questions presented are so substantial as to require plenary consideration, with briefs and oral argument, for their resolution.

(g) The injunction in this case was not interlocutory, but was issued after a trial on the merits.

(h) The ruling of United States District Judge J. Skelly Wright on appellant's Motion to Dismiss was entered as a Minute Entry November 18, 1954. A copy of this ruling, denying the Motion to Dismiss, is attached hereto as Appendix "E".

The Findings of Fact and Conclusions of Law by United States District Judge J. Skelly Wright are dated February 5, 1957. A copy of the Findings of Fact and Conclusions of Law are attached hereto as Appendix "F".

The Opinion and Decree by United States District Judge J. Skelly Wright in accordance with the Findings of Fact and Conclusions of Law is dated February 5, 1957. A copy of this Opinion and Decree is attached hereto as Appendix "A".

The Final Judgment rendered by United States District Judge J. Skelly Wright is dated March 19, 1957, and a copy is attached hereto as Appendix "G".

On March 29, 1957, appellant filed a motion for new trial or to amend and supplement Findings of Fact, Conclusions of Law and Judgment.

Appellant's Motion for a New Trial was denied on April 10, 1957. Appellant's Motion to Amend the Findings of Fact and Conclusions of Law was partially granted by United States District Judge J. Skelly Wright under Minute Entry dated April 10, 1957. A copy of the Order denying appellant's Motion for a New Trial and granting partial amendment to the Findings of Fact and Conclusions of Law is attached hereto as Appendix "H".

Appellant respectfully submits that the questions presented by this appeal are substantial and of general public importance and merit full consideration by this Court.

Appellant accordingly prays that this Court enter an Order noting jurisdiction.

Respectfully submitted,

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CERTIFICATE.

I, MURRAY F. CLEVELAND, one of the attorneys for the New Orleans Insurance Exchange, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 22nd day of August, 1957, I served copies of the foregoing Statement of Jurisdiction on the United States of America, by (a) leaving a copy thereof at the office of M. Hepburn Many, United States Attorney for the Eastern District of Louisiana, Federal Building, New Orleans, Louisiana, and (b) by mailing copies thereof in properly addressed envelopes, with air mail postage prepaid to (1) the Solicitor General, Department of Justice, Washington 25, D. C., and (2) Edward R. Kenney and William Rowan, Esqs., Counsel of record for the Government.

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APPENDIX "A".

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

No. 4292
CIVIL ACTION

UNITED STATES OF AMERICA,
Plaintiff

versus

NEW ORLEANS INSURANCE EXCHANGE,
Defendant.

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WRIGHT, District Judge:

The New Orleans Insurance Exchange, a private association of 130 insurance agencies[1] which control approximately three-fourths[2] of the fire, casualty and surety[3] insurance business in the New Orleans area,[4] is charged in these proceedings with violations of Sections 1 and 2 of the Sherman Act.[5] Specifically, the complaint charges that the

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[1] These independent agencies are part of what is called the American agency system, that is, they solicit insurance from the public and place it, at their election, with one or more of several companies represented by them. The agencies own what are called "expirations" on the policies handled by them. Expirations are the property right which inheres in having sold the existing policy and in knowing when it will expire, so that a renewal may be obtained. It is generally recognized in the trade that one who owns the expirations, generally speaking, controls renewals.

[2] The Exchange occupies a dominant position in the fire, casualty and surety insurance market in the New Orleans area. During the period 1951 through 1954, member agents wrote: (1) 65.1% of all multiple lines of insurance written by fire and casualty companies in the New Orleans area; (2) 71.6% of all lines of insurance written in the New Orleans area under the jurisdiction of the Exchange; (3) 81.3% of fire insurance written in the New Orleans area; (4) 67.4% of casualty insurance (excluding accident and health) in the New Orleans area; and (5) 98.1% of surety insurance in the New Orleans area. In addition, member agents represent over 90% of the stock fire and casualty companies in the United States which possess assets in excess of $50,000,000. The dollar volume of business written by Exchange members is substantial, amounting to approximately $25,000,000 to $30,000,000 in premiums annually.

[3] The complaint does not specifically cover contracts of surety although such contracts may be included in the term casualty insurance. In any event, no objection was made to the evidence concerning surety agreements when it was first offered and no prejudice is shown by the admission thereof. Rule 15 (b), Fed. R. Civ. P.

[4] This area is composed of Orleans, Jefferson and St. Bernard Parishes.

[5] The relevant sections of the Sherman Act (Act of July 2, 1890, c. 647, 26 Stat. 209, as amended) provide in part as follows:

"Sec. 1. (26 Stat. 209; 50 Stat. 693; 15 U. S. C. §1) Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *

"Sec. 2 (26 Stat. 209; 15 U. S. C. §2) Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or

Exchange and its members are engaging in an unlawful combination and conspiracy to restrain interstate commerce in insurance and to acquire a monopoly in its area of operations by maintaining a group boycott against all non-member insurance agencies as well as against all insurance companies which do not plant exclusively through Exchange outlets or members.

The defendant admits the boycott but denies that it unreasonably restrains trade or tends toward monopoly. It also denies that its members are engaged in interstate commerce. It asserts further that the McCarran Act[6] excludes the business of insurance from the operation of the federal antitrust laws.

The group boycott is effected through a series of bylaws of the Exchange by which members thereof agree to boycott any stock company which plants through any except Exchange agents in the New Orleans area,[7] to boy-

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with foreign nations, shall be deemed guilty of a misdemeanor, * * *

"Sec. 4. (26 Stat. 209; 15 U. S. C. §4.) The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * *"

[6] 15 U. S. C. §1013 (a) and (b).

[7] The bylaws read as follows:

Article X, Section 1:

"Active Members shall not accept or retain the agency of any company, including Underwriters of same, which has or whose General Agent or Manager has agents within the jurisdiction of this Exchange who are not Active Members of the Exchange."

Article X, Section 2:

"Active Members shall not accept or retain the agency of any insurance company, including its parent corporation, all underwriting agencies of such company, members of a group or fleet of companies, and all companies owned, either in whole or in part, managed, controlled, directly or indirectly, or reinsured by such company, unless all agents within the jurisdiction of this Exchange, of such insurance companies, are members of this Exchange."

cott any stock company which sells directly to the public,[8] to boycott mutual companies irrespective of how or by whom the insurance is sold,[9] and to boycott nonmember agencies so that the facilities of companies planting exclusively through Exchange outlets are denied such agents.[10] These bylaws are rigidly enforced. All members are under obligation to police other members and to report violations. A member charged must make a full disclosure by presenting his books and records for examination by the Exchange, and any member found guilty of violation of bylaws is substantially fined or expelled from the Association. When a member is expelled from the Exchange, he is stripped of his representation of Ex-

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[8] The bylaw reads as follows:

Article X, Section 3:

"Active or Associate Members of this Exchange may not represent or place business with a company, not a member of this Exchange, whose State Agent, Special Agent, Manager or salaried representative solicits from or issues policies or bonds direct to the public within the jurisdiction of this Exchange or accepts such business from a non-member of this Exchange."

[9] The bylaw reads as follows:

Article IX, Section 6:

"It shall not be permissible for Members to place business within the jurisdiction of the Exchange with non-member agents or with any type of non-stock carriers unless and until the facilities of all members of the Exchange have been exhausted and an affidavit to that effect has been filed with the Secretary of the Exchange within ten days of the binding of the risk."

[10] The bylaws read as follows:

Article IX, Section 6 (See Note 9)

Article IX, Section 7:

"It is permissible for Active Members to accept business from Non-Member Agents and Brokers domiciled in the territorial jurisdiction of the Exchange, provided no commission or other valuable consideration is paid directly or indirectly on such business; and, provided further, that the member immediately notify the Secretary of the Exchange in writing, giving the name of the Non-Member, character and location of the risk, amount of insurance and premiums, and further pays to the Exchange, promptly, an amount equal to 10% of the net premiums involved, which said amount so paid, shall go towards the cost of keeping a record of such transactions."

change controlled companies and is thus required to operate outside the Exchange subject to the group boycott provided in the bylaws.

The effect of the boycott, as shown by the evidence, is that practically all the major stock companies plant exclusively through Exchange outlets and deny their facilities to non-Exchange members, in spite of the fact that in other areas uncontrolled by similar boycott, the same insurance companies plant through agents representing all types of insurance companies, including mutuals. In fact, some of the stock companies whose method of operation is controlled by the boycott of the defendant Exchange sell directly to the public in uncontrolled areas. Moreover, by being denied the facilities of the large stock companies controlled by the Exchange, nonmember agents operating in the area are relegated to handling risks which do not require the capacity of the controlled companies. Insurance companies such as mutuals and direct writers, who are not allowed to plant through Exchange outlets, are subjected to the group boycott and are thus excluded from the substantial market controlled by the Exchange. An additional effect of the group boycott is that part of the public which has placed its confidence concerning insurance matters with members of the Exchange is denied access to low cost insurance.

The Government insists, with much support from the authorities, that the bylaws of the Exchange, rigorously enforced as they are, constitute a per se violation of the Sherman Act. In fact, this case is remarkably close in many of its aspects to *Fashion Originators' Guild of America, Inc. v. Federal Trade Commission*, 312 U. S. 457, where the Court held that evidence on the question of

reasonableness of the boycott there in suit was immaterial, that, without more, the purpose and object of the unlawful combination, its tendency toward monopoly and the coercion practiced upon a rival method of competition brought it within the prohibition of the Sherman Act.

In the Fashion Guild case, the defendants were designers, manufacturers and distributors of women's clothes. In order to control what they considered to be piracy of their clothing designs, the members of the Guild devised a plan whereby they refused to sell to retailers who purchased and sold garments which were unauthorized copies of designs of Guild members. The Supreme Court held that the combination was "well within the inhibition of the policies declared by the Sherman Act itself."[11] The language used by the Court in denouncing the vices of the Guild's scheme is so pertinent here that it bears repeating.[12] The Supreme Court has also indicated in *Inter-*

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[11] **Fashion Originators' Guild v. Federal Trade Commission**, supra, p. 465.

[12] In **Fashion Originators' Guild v. Federal Trade Commission**, supra, at pp. 465 and 466, the Court said:

> "And among the many respects in which the Guild's plan runs contrary to the policy of the Sherman Act are these: it narrows the outlets to which garment and textile manufacturers can sell and the sources from which the retailers can buy (**Montague & Co. v. Lowry**, 193 U. S. 38, 45; **Standard Sanitary Mfg. Co. v. United States**, 226 U. S. 20, 48-49); subjects all retailers and manufacturers who decline to comply with the Guild's program to an organized boycott (**Eastern States Retail Lumber Dealers' Assn. v. United States**, 234 U. S. 600, 609-611); takes away the freedom of action of members by requiring each to reveal to the Guild the intimate details of their individual affairs (**United States v. American Linseed Oil Co.**, 262 U. S. 371, 389); and has both as its necessary tendency and as its purpose and effect the direct suppression of competition from the sale of unregistered textiles and copied designs (**United States v. American Linseed Oil Co.**, supra, at 389). In addition to all this, the combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus 'trenches upon the power of the national legislature and violates the statute.' **Addyston Pipe & Steel Co. v. United States**, 175 U. S. 211, 242."

national Salt Co., Inc. v. United States,[13] 332 U. S. 392, and *United States v. Columbia Steel Co.*,[14] 334 U. S. 495, that group boycotts are unreasonable per se and "clearly run afoul of Section 1"[15] of the Sherman Act.

But it is not necessary to decide this case on a per se basis. The rule of reason[16] dictates that this illegal combination must be destroyed. As shown above, the group boycott in suit not only had the potential unreasonably to coerce, restrain and control interstate commerce in insurance in the New Orleans area but it actually did. In fact, this defendant, through the dominant position of its membership, sits astride the stream of interstate commerce in insurance in the New Orleans area and directs its flow. It allows the large stock companies access to its outlets on condition that those companies participate in its group boycott of nonmember agencies. **It refuses to allow any part of the 75 per cent of the insurance which it controls to move in the direction of mutuals or direct writers,**

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[13] In International Salt Co. v. United States, supra, at p. 396, the Court said:

> "Not only is price-fixing unreasonable, per se (citing cases), but also it is unreasonable, per se, to foreclose competitors from any substantial market. Fashion Originators Guild v. Federal Trade Commission, 114 F. (2d) 80, affirmed, 312 U. S. 457."

[14] In United States v. Columbia Steel Co., supra, at pp. 522, 523, the Court said:

> "A restraint may be unreasonable either because a restraint otherwise reasonable is accompanied with a specific intent to accomplish a forbidden restraint or because it falls within the class of restraints that are illegal per se. For example, where a complaint charges that the defendants have engaged in price fixing, or have concertedly refused to deal with non-members of an association, or have licensed a patented device on condition that unpatented materials be employed in conjunction with the patented device, then the amount of commerce involved is immaterial because such restraints are illegal per se. * * *"

[15] The Times-Picayune Publishing Co. v. United States, 345 U. S. 594, 625.

[16] See Standard Oil Company v. United States, 221 U. S. 1.

and it relegates the numerically superior nonmember agencies to the discriminatory position of scrambling for the remaining 25% of the business while excluding them from placing it with the major stock companies controlled by the Exchange. Such unreasonable restraints are calculated to affect adversely the persons subjected to the discrimination, and this record confirms the calculation.

In short, the Exchange practices are essentially the same, in purpose and effect, as those denounced as violative of the Sherman Act in Fashion Guild, supra. And here the evidence demonstrates that these practices not only tended to but actually did impose unreasonable restraints on interstate commerce. The Exchange's group boycott narrows the outlets or agents through which insurance companies can sell and the sources or companies through which agents can place insurance; it takes away the freedom of action of its own members by requiring them to participate in the boycott and to reveal to the Exchange the intimate details of their individual affairs to insure that they do; it suppresses competition from mutual and direct writer insurance companies as well as competition from nonmember agencies generally; and in addition to all this, the Exchange is in reality a private super-governmental agency which prescribes rules for the regulation and restraint of interstate commerce, provides extra-judicial tribunals for determination and punishment of violations, and thus trenches beyond the power of the national and state[17] legislatures, in addition to violating the Sherman Act.

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[17] Louisiana has a comprehensive insurance code providing for the complete regulation of the insurance industry within the state. La. R. S. 22:1-22:1734.

Group boycotts and concerted refusals to deal flout the Sherman Act's command that competition rule the market place. Our economic faith is predicated on free competition uninhibited by group boycotts or other predatory practices. Not only must merchandise stand the cold test of competition, but services performed in connection with the sale thereof must be submitted to the same test, so that, in the last analysis, the public may have a free choice in spending its money, and businesses, willing and able to compete for that money, may have a free opportunity to do so. Therefore, any group boycott or concerted refusal to deal, if in fact not a per se violation of the Sherman Act, must, at the very least, be viewed with dark suspicion because of the commercial restraints and tendency toward monopoly inherent in such combinations. Where, as here, it is shown that the group boycott imposes unreasonable restraints on interstate commerce in violation of Section 1 of the Sherman Act, a Section 2 violation is just a short step away, for most, if not all, unreasonable restraints have as their purpose the acquisition of at least a greater share of commerce than could otherwise be obtained in a free economy. Combinations indulging in group boycotts, then, must be put to proof to clear themselves of the predatory intent required for violation of Section 2 of the Act. *Standard Oil Company v. United States*, supra, p. 75. Here such proof is wholly lacking. On the contrary, this record depicts a nascent, if not an accomplished, monopoly, nurtured by group boycott.

The Exchange makes the contention that its group boycott of non-members and uncooperative insurers does not deny them the right to approach the public and sell insurance outside the Exchange. That is true. But it is

the agency who controls the insurance buyer and the placement of his insurance. Admittedly, the Exchange agencies control approximately 75 per cent of the concerned insurance purchased in the New Orleans area. That insurance is placed with companies chosen by the agencies and not by the assureds. Consequently, any company who is allowed to plant through Exchange agencies, even on an exclusive basis, is happy to accept the "invitation" since otherwise it would be denied access to three-fourths of the insurance business in the area. And the minute a company submits to Exchange coercion and control, nonmember agencies are denied access to that company for the placement of risks.

The result, therefore, is that not only are the mutuals and other companies operating outside the Exchange excluded from a substantial market by a group boycott effected through the use of the dominant position of the Exchange, but companies allowed to do business through the Exchange outlets are actually controlled in their method of doing business in that, in addition to being denied the right to deal directly with the public, they must participate in the Exchange boycott of nonmember agencies. Not only are nonmember agencies restricted in their operations by a group boycott effected through the use of the dominant position of the Exchange, but the member agencies themselves are prisoners, sometimes unwilling prisoners, of their own rules, for they, too, are limited in their operations under pain of expulsion and boycott. It must be remembered that in suit here is a group boycott, participation in which is required of every Exchange member by its bylaws. While an individual agency may have the right to boycott another agency or

an insurance company,[18] a concerted refusal to deal brings the combination within the condemnation of the Sherman Act. *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U. S. 211; *American Medical Association v. United States*, 317 U. S. 519; *Paramount Famous Corp. v. United States*, 282 U. S. 30; *Eastern States Retail Lumber Dealers' Ass'n. v. United States*, 234 U. S. 600.

The Exchange also states that its reason for boycotting mutual insurance companies is that the mutuals are socialistic in character whereas its membership is dedicated to the American way of life. That argument sounds high and lofty but the truth is that not only are mutuals boycotted under the requirements of the bylaws, but any company, stock, mutual or otherwise, which does not plant exclusively with Exchange members is likewise discriminated against. Thus the touchstone for acceptance by the Exchange is not belief or disbelief in socialism but willingness to submit to the restraints imposed by the Exchange.

The Exchange also argues that the reason for the restrictive bylaws is to protect the American agency system. But good intent is no defense under Section One of the Act except in non per se violations where unreasonable restraints are not shown. *United States v. Columbia Steel Co.*, supra, p. 522. Where, as here, unreasonable restraints are shown, the requisite intent is inferred from the unlawful effects. *The Times-Picayune Publishing Co. v. United States*, supra, p. 614; *United States v. Griffith*, 334 U. S. 100, 105, 108; *United States v. Patten*, 226 U. S. 525, 543.

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[18] Compare Lorain Journal v. United States, 342 U. S. 143; United States v. Colgate & Co., 250 U. S. 300.

The asseverations of good intent are also subject to considerable question. The evidence shows that mutual companies who are not direct writers also use the American agency system. In fact, all of the government's witnesses are mutual agents who are a part of the American agency system. Moreover, unt. 1950 there was an Exchange bylaw which applied the boycott against participating stock companies[19] using the American agency system, irrespective of their willingness to submit to Exchange control. Although the bylaw was repealed in 1950, the evidence shows that the boycott continues. It would seem, therefore, that the reason for the boycott of mutual as well as participating stock companies, as shown by the minutes of the meeting of the Exchange at which the boycott against participating stock companies was adopted, is, not the protection of the American agency system, but the prevention of a possible reduction in agency commissions caused by reduction in cost of insurance to the public.

The defenses of the Exchange regarding interstate commerce and the McCarran Act may be quickly disposed of. In *United States v. Southeastern Underwriters Association*, 322 U. S. 533, the Court held that the business of insurance, when conducted across state lines,[20] is in-

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[19] A participating stock company is like a mutual insurance company in that the policyholders participate in the profits of the company by receiving dividends, thereby reducing the net cost of the insurance.

[20] The record shows that 90% of the insurance companies concerned here are domiciled in states other than Louisiana. In **United States v. Southeastern Underwriters Association**, supra, at p. 537, the Court said:

> "(T)he insurance business * * * include(s) not only the execution of insurance contracts but also negotiations and events prior to execution of the contracts and the innumerable transactions necessary to performance of the contracts. All of these alleged transactions * * * constituted a single continuous chain of events, many of which, * * * could possibly have been continued but for that part of them which moved back and forth across state lines."

terstate commerce. And even where, as here, the challenged activity is at the local level, "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States v. Women's Sportswear Manufacturers Association*, 336 U. S. 460, 464; *United States v. Employing Plasterers Association of Chicago*, 347 U. S. 186.

It is true that Section 3 (a) [21] of the McCarran Act provides that the Sherman Act "shall not apply to the business of insurance or to acts in the conduct thereof." But Section 3 (b) [22] of the same act provides: "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." The legislative history of Section 3 (b) affirms what its language so plainly says.[23] *United States v. Insurance Board of Cleveland*, 144 F. Supp. 684.

Decree for plaintiff in accord with Findings of Fact and Conclusions of Law this day rendered.

J. SKELLY WRIGHT
United States District Judge

New Orleans, Louisiana
February 5, 1957

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[21] 15 U. S. C. §1013 (a)

[22] 15 U. S. C. §1013 (b)

[23] 91 Cong. Rec. 1486, Feb. 27, 1945. The Senate Judiciary Report on the bill reads:

> "Section 4 (Section 3 of the final enactment) suspends the application of the Sherman Act and the Clayton Act to the business of insurance until January 1, 1948; and (b) provides that at no time are the prohibitions in the Sherman Act against any act of boycott, coercion, or intimidation suspended. These provisions of the Sherman Act remain in full force and effect."

APPENDIX "B"

THE SHERMAN ANTI-TRUST ACT, TITLE 15 U. S. C. A. SECTIONS 1-2

Section 1. **Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty**

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: Provided, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with

each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, Section 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693.

Section 2. **Monopolizing trade a misdemeanor; penalty**

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, Section 2, 26 Stat. 209.

APPENDIX "C"

TITLE 15 U. S. C. A. SECTION 29

Section 29. **Appeals to Supreme Court**

In every civil action brought in any district court of the United States under any of said Acts (The Sherman Anti-Trust Act of July 2, 1890, and the Clayton Act of October 15, 1914) wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court. (Feb. 11, 1903, c. 544, Section 2, 32 Stat. 823; Mar. 3, 1911, c. 231, Section 291, 36 Stat. 1167; June 9, 1944, c. 239, 58 Stat. 272; June 25, 1948, c. 646, Section 17, 62 Stat. 989.)

APPENDIX "D"

THE McCARRAN ACT
TITLE 15 U. S. C. A. SECTIONS 1011, 1012, 1013

Section 1011. **Declaration of policy**

Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States. Mar. 9, 1945, c. 20, Section 1, 59 Stat. 33.

Section 1012. **Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948**

a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance; Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to

the extent that such business is not regulated by State law. Mar. 9, 1945, c. 20, Section 2, 59 Stat. 34; July 25, 1947, c. 326, 61 Stat. 448.

Section 1013. **Suspension until June 30, 1948, of application of certain Federal laws; Sherman Anti-Trust Act, applicable to agreements to, or acts of, boycott, coercion, or intimidation.**

a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Anti-discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation. Mar. 9, 1945, c. 20, Section 3, 59 Stat. 34; July 25 1947, c. 326, 61 Stat. 448.

APPENDIX "E".

MINUTE ENTRY
NOVEMBER 18, 1954
WRIGHT, J.

No. 4292
CIVIL ACTION

UNITED STATES OF AMERICA

versus

NEW ORLEANS INSURANCE EXCHANGE

RULING ON MOTION TO DISMISS COMPLAINT.

This matter came on this day for hearing on the motion of defendant to dismiss the complaint. The Court having heard the argument and studied the briefs filed by counsel for both sides, now makes the following ruling.

IT IS ORDERED that the motion to dismiss be and the same is hereby denied.

REASONS.

The complaint, the allegations of which for the purposes of the motion to dismiss must be taken as true,

charges that the defendant and its membership are engaged in an unlawful combination and conspiracy to restrain and monopolize interstate commerce in the business of selling and writing fire and casualty insurance by means of boycott, coercion and intimidation.

The business of insurance, when conducted across state lines, is interstate commerce. *U. S. v. South-Eastern Underwriters Association*, 322 U. S. 533. Boycotts, coercion and intimidation in the insurance field are subject to the Sherman Antitrust Act. 12 U. S. C. 1013 (b). Though the challenged activity be at the local level, "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *U. S. v. Women's Sportswear Manufacturers Association*, 336 U. S. 460, 464; *U. S. v. Employing Plasterers Association of Chicago*, 347 U. S. 186. The protection of the Sherman Act is not limited to the public or consumers alone. "The act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U. S. 219, 236.

s/ J. S. W.

APPENDIX "F".

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

No. 4292
CIVIL ACTION

UNITED STATES OF AMERICA,
Plaintiff

versus

NEW ORLEANS INSURANCE EXCHANGE,
Defendant.

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WRIGHT, District Judge:

FINDINGS OF FACT

1. Defendant, New Orleans Insurance Exchange, is an association of insurance agents, brokers and solicitors, incorporated under the laws of the State of Louisiana. The defendant transacts business in the Parishes of Orleans, Jefferson and St. Bernard, Louisiana,[1] which are within the New Orleans Division of the Eastern District of Louisiana.

2. There are approximately 130 agent members of the defendant Exchange representing 220 stock fire and casualty insurance companies. Each of said agents is engaged in the business of selling fire, casualty and surety insurance in the Parishes of Orleans, Jefferson or St. Bernard, Louisiana.

3. The properties covered by insurance written through member agents include, among others, dwelling houses and their contents, wholesale and retail stores and their contents, office buildings, public buildings, factories, hotels, warehouses and terminals, garages and motor vehicles.

4. Fire and casualty insurance companies operate either by directly soliciting the policyholder through branch offices or by appointing an agent or agents to represent the company. In the New Orleans area, virtually all stock companies sell fire, casualty and surety insurance policies through agents rather than through branch offices. The statutes of the State of Louisiana require that any person who seeks to procure, receive or forward

[1] Hereinafter sometimes referred to as the New Orleans area.

applications for fire, casualty or surety insurance must be licensed by and subject to the supervision of the Insurance Commissioner of the State.

5. The amount of insurance that a particular insurance company will accept on a particular risk is known as the "capacity" of the company. Agents are acquainted with the capacity of a company either by means of a so called "line sheet" or through normal business contact with representatives of the company. But companies can and do increase their ability to accept risks through the employment of reinsurance. Some companies will readily accept risks in excess of their capacity. However, companies will accept risks in excess of their capacity only if, in their judgment, it is desirable to obtain reinsurance.

An agent is limited in the amount of fire insurance he can provide on a given risk by the capacity of the companies he represents plus the amount of reinsurance the companies decide to procure over and beyond their own capacities. Where the companies represented by an agent will accept only part of a risk which the agent seeks to insure, he must place the excess with other agents or brokers. Although the number of risks in this category is small, the risks involved are quite often very large. If an agent is unable to place the excess in this manner, he may lose the opportunity to secure any of the business.

6. The successful business operation of an agent is directly related to his opportunity to represent financially sound, well-managed insurance companies which possess sufficient capacity and facilities for handling the business he produces. Customers sometimes request the agent

to place their insurance with a particularly large, well known insurance company.

7. The successful business operation of a fire and casualty insurance company in any locality where the company desires to operate through agents is directly related to its opportunity to secure the representation of the most profitable and best established agencies. Control of the business resides to a great extent with the agents. The policyholder places business with the agents, and the choice of companies is generally left to the agent. Personal contract with the policyholder is confined to the agent, so that there is little a company can do to increase its business by direct appeal to the policyholder. Accordingly, the company seeks representation with the agent or agents possessing the largest established clientele. Furthermore, the company delegates to the agents wide discretionary powers which may involve substantial financial risk to the company. Therefore, it is essential that the company be represented by an agent who is skillful, reliable and responsible in the selection of risks, preparation of policies and reports, and the collection of premiums and the payment of claims.

8. The great majority of fire and casualty companies doing business in the New Orleans area maintain their home offices outside the State of Louisiana. There is a steady flow of supplies including, among other things, policy forms, maps and stationery from the home offices of the companies to agents located in New Orleans. Such supplies remain the property of the company and policy forms are returned upon termination of an agency. Agents on behalf of the companies solicit prospects, accept

or reject offers of fire and casualty insurance, issue policies and collect premiums. Agents make regular reports to company offices located outside the State of Louisiana. Premiums are mailed to the home offices directly by the local agent or to the general agent who in turn remits to the home office. Losses are generally reported to the home office and checks in payment of claims are sent to the agent from the out-of-state office. The foregoing business of these out-of-state corporations conducted by their local agents results in a continuous flow of business transactions between the local agents located in the New Orleans area and fire and casualty insurance companies outside of the State of Louisiana.

9. The Exchange occupies a dominant position in the fire, casualty and surety insurance market in the New Orleans area. During the period 1951 through 1954, member agents wrote: (1) 65.1% of all multiple lines of insurance written by fire and casualty companies in the New Orleans area; (2) 71.6% of all lines of insurance written in the New Orleans area under the jurisdiction of the Exchange; (3) 81.3% of fire insurance written in the New Orleans area; (4) 67.4% of casualty insurance (excluding accident and health) in the New Orleans area; and (5) 98.1% of surety insurance in the New Orleans area. In addition, member agents represent over 90% of the stock fire and casualty companies in the United States which possess assets in excess of $50,000,000.00. The dollar volume of business written by Exchange members is substantial, amounting to approximately $25,000,000 to $30,000,000 in premiums annually.

10. It is common knowledge among persons in the insurance field that members of the Exchange write the majority of fire, casualty and surety insurance in the New Orleans area. Nonmember agents have been prevented from representing Exchange companies which offer the only available facilities for writing certain risks in the fire, casualty and surety field because of the Exchange rules. As a result of their inability to obtain the facilities of Exchange represented companies, the operations of non-Exchange agents have been hampered and substantial loss has been incurred. Non-Exchange agents could increase their volume of business to a substantial extent if the facilities afforded by Exchange represented stock companies were available to them.

11. In order to qualify for active membership in the Exchange, an agent must, among other requirements, represent only stock companies; have as his only occupation the active solicitation of insurance from the public; receive a favorable vote from 75% of the active members of the Exchange, present at a meeting and voting; and purchase a share of stock in the Exchange and pay an assessment involving a total cost of approximately $1,000.

12. All members of the Exchange agree to be governed by the existing bylaws of the Exchange and such rules and regulations as may in the future be adopted by the Exchange.

13. Members of the Exchange agree to boycott and not to represent companies who appoint agents in Orleans, Jefferson and St. Bernard Parishes, Louisiana, for the sale of fire, casualty and surety insurance, who are not

members of the Exchange. This agreement has been in effect for many years and at least since February 14, 1936, and is still in effect.

14. Members of the Exchange agree to boycott and not to transact business for or with agents who are not members of the Exchange except upon arbitrary conditions adopted by the Exchange. Pursuant to this agreement, members agree not to place business with nonmember agents or with non-stock carriers unless and until the facilities of all members of the Exchange have been exhausted and an affidavit to that effect has been filed with the Secretary of the Exchange. The members also agree to accept business from nonmember agents and brokers only on the condition that no commission or other valuable consideration is paid directly or indirectly on such business; and, provided further, that the member immediately notifies the Secretary of the Exchange giving a description of the risk and further pays to the Exchange an amount equal to 10% of the net premiums involved. This agreement has been in effect for many years and at least since January 31, 1936 and is still in effect.

15. Members of the Exchange agree to boycott and not to represent nonstock companies. This agreement has been in effect for many years and at least since February 21, 1936 and is still in effect.

16. Members of the Exchange agree to boycott and not to represent companies which solicit fire, casualty or surety insurance in the New Orleans area directly from the policyholder. This agreement has been in effect for many years and at least since November 30, 1936 and is still in effect.

17. Members of the Exchange agree to accept business from members of the Exchange under suspension only on the condition that no commission is paid on such business.

18. Members of the Exchange agree that all members, with the exception of charter members, shall not be permitted to engage in any other business except the sale of insurance.

19. Members of the Exchange agree to abide by specified maximum commission rates to be paid to solicitors and other persons in business under the jurisdiction of the Exchange.

20. Members of the Exchange subscribe and adhere to a set of regulations or bylaws enacted by the membership to govern and control the business activities of members for the purpose and with the result of carrying out and enforcing the agreements set forth in Findings 12 through 19.

21. The rules of the Exchange contain provisions for the vigorous and comprehensive enforcement and policing of said regulations. Elaborate procedure is established for submitting, investigating and hearing complaints regarding violations of or failure to comply with the regulations and rules of the Exchange. As part of this procedure the executive committee of the Exchange is empowered to require members to furnish information relating to suspected violations and failure to comply subjects a member to discipline.

22. In accordance with the regulations of the Exchange, members who have been found guilty of violating

the regulations or rules of the Exchange have been fined, expelled, suspended or reprimanded.

23. The business activities of the members have been rigidly inspected, policed and supervised by the Exchange. In addition, the Exchange has maintained a close scrutiny of the business activities of nonmembers to assure that members of the Exchange are adhering to the bylaws of the Exchange.

24. As a result of the foregoing agreements, members of the Exchange have been coerced and intimidated into confining their representation of fire and casualty insurance companies to those companies which appoint Exchange agents exclusively.

25. As a result of the foregoing agreements, stock, fire and casualty insurance companies have confined their appointment of agents to members of the Exchange, and have cancelled the appointment of agents not members of the Exchange.

26. As a result of the foregoing agreements, an Exchange represented company which appoints any agent outside of the Exchange, is subjected to a boycott by its Exchange member agents.

27. As a result of the foregoing agreements, a person desiring to become an insurance agent in the New Orleans area must make a choice between two alternatives: (1) to join the Exchange and give up the right to sell low cost mutual insurance, give up the right to establish brokerage agreements with non-Exchange agents, and give up the right to represent any non-Exchange company; or

(2) not to join the Exchange, give up the right to establish brokerage arrangements with Exchange agents, and give up the right to represent any Exchange represented company.

28. As a result of the foregoing agreements, non-Exchange agents have been denied a free choice in seeking appointments to represent fire and casualty insurance companies in the sale of fire, casualty and surety insurance.

29. As a result of the foregoing agreements, non-member agents have been prevented from representing Exchange companies which offer the only available facilities for writing certain risks in the fire, casualty and surety field.

30. The operations of non-Exchange agents have been hampered and substantial financial loss has been incurred as a result of their inability to obtain the facilities of Exchange represented companies. Non-Exchange agents could increase their volume of business to a substantial extent if the facilities afforded by Exchange represented stock companies were available to them.

31. The same stock, fire and casualty insurance companies which operate in New Orleans exclusively through members of the Exchange are represented in other sections of the United States by agents who also represent mutual insurance companies.

32. Under normal conditions, insurance agents find it profitable and desirable to share business with each other where, for various reasons, an agent cannot place it with his own companies. As a result of the fore-

going agreements, insurance agents in the New Orleans area have been denied a free choice among other agents, and hence among fire and casualty insurance companies, in brokering fire, casualty and surety insurance.

33. On numerous occasions members and nonmembers sought to broker, and did broker, business with each other. In those instances in which Exchange members failed to conform to the foregoing rules of the Exchange and paid a commission to the nonmember agent, they were fined in amounts ranging up to $1,000 or ultimately expelled from the Exchange for refusal to pay the imposed fine.

34. As a result of the foregoing agreements, non-Exchange agents and brokers have lost substantial amounts of money in the form of commissions as a result of the Exchange rule prohibiting the payment of commissions to nonmembers on brokerage business.

35. As a result of the foregoing agreements, fire and casualty insurance companies desiring to conduct business in the New Orleans area have been denied a free choice in the selection of available outlets as represented by agents.

36. As a result of the foregoing agreements, all insurance companies represented by nonmember agents in the New Orleans area are prevented from obtaining the representation of Exchange agents who exercise substantial control over the majority of insurance business in the New Orleans area.

37. The companies referred to in Finding 36, all nonstock companies, and all companies which solicit insur-

ance directly from the public have been denied access to and have been excluded from a substantial part of the market for fire, casualty and surety insurance.

38. As a result of the foregoing agreements, Exchange represented companies have been prevented from soliciting insurance directly from the public through the medium of their salaried representatives.

39. As a result of the foregoing agreements, general agents have been prevented from soliciting insurance directly from the public.

40. By means of the foregoing agreements, the Exchange and its members have controlled and adversely affected the business operating policies of fire and casualty insurance companies, not only in respect to their choice of outlets, but also in various other vital phases of their operations.

41. Members of the Exchange boycotted stock insurance companies operating under the so-called American Agency System when these companies issued policies which offered the policyholders an opportunity to participate in the profits of the company through dividends, thereby reducing the net cost of the insurance: The members of the Exchange were fearful that this plan would lead to a reduction in their commissions.

42. With the purpose and intent of excluding competition and attempting to monopolize the sale and writing of fire, casualty and surety insurance in the New Orleans area, the Exchange and its members have boycotted mutual insurance companies, direct writing

stock companies, agency stock companies which issued policies through salaried representatives or offered participating policies, and have coerced organizations which planned to self-insure not to do so.

43. With the purpose and intent of excluding competition and attempting to monopolize the sale and writing of fire, casualty and surety insurance in the New Orleans area, the Exchange and its members for many years have been engaged and now are engaged in a continuing agreement and concert of action to prevent, hinder and discourage the selling and writing of fire, casualty and surety insurance in the New Orleans area through outlets other than those of its members and except on terms and conditions imposed by the Exchange and its members.

CONCLUSIONS OF LAW.

1. Pursuant to the terms of the foregoing agreements, the defendant and co-conspirators have been for many years and now are engaged in a conspiracy to restrain the business of selling and writing fire, casualty and surety insurance in the Parishes of Orleans, Jefferson and St. Bernard, Louisiana.

2. Pursuant to the terms of the foregoing agreements, the defendant and co-conspirators have been for many years and now are engaged in a conspiracy to monopolize the business of selling and writing fire, casualty and surety insurance in the Parishes of Orleans, Jefferson and St. Bernard, Louisiana.

3. Pursuant to the terms of the foregoing agreements, the defendant and co-conspirators have been for

many years and now are engaged in an attempt to monopolize the business of selling and writing fire, casualty and surety insurance in Orleans, Jefferson and St. Bernard Parishes, Louisiana.

4. The effect of the foregoing agreements is substantially to restrict competition and to control markets in interstate commerce in the writing and selling of fire, casualty and surety insurance.

J. SKELLY WRIGHT
United States District Judge

New Orleans, Louisiana
February 5, 1957

APPENDIX "G".

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

No. 4292
CIVIL ACTION

UNITED STATES OF AMERICA,
Plaintiff

versus

NEW ORLEANS INSURANCE EXCHANGE,
Defendant

FINAL JUDGMENT.

The plaintiff, United States of America, having filed its complaint herein on January 15, 1954, the defendant, New Orleans Insurance Exchange, having appeared and filed its answer to such complaint, the issues having been tried from May 7, 1956 through May 9, 1956, final argument having been had on December 6, 1956, the Court having entered its Findings of Fact and Conclusions of Law together with its opinion on February 5, 1957, and it appearing to the Court that there is no just reason for delay in entering a Final Judgment, it is

hereby ORDERED, ADJUDGED AND DECREED as follows:

I.

The Court has jurisdiction of the subject matter hereof and of the parties herein. The defendant, New Orleans Insurance Exchange, has combined and conspired with its members and others to unreasonably restrain and to monopolize and has attempted to monopolize trade and commerce in fire, casualty and surety insurance, in violation of Sections 1 and 2 of the Act of Congress of July 2, 1890 entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II.

As used in this Final Judgment:

(A) "Person" shall mean any individual, corporation, partnership, association or any other business or legal entity;

(B) "Exchange" shall mean the defendant New Orleans Insurance Exchange, a corporation organized and existing under the laws of the State of Louisiana;

(C) "Insurance" shall mean fire, casualty and surety insurance and each of them;

(D) "Mutual company" shall mean any insurance company in which proprietorship rights are vested in the policyholders rather than stockholders;

(E) "Participating company" shall mean any insurance company which allows its policyholders to par-

ticipate in the profits of the company through the issuance of dividends or otherwise;

(F) "Agent" shall mean any person engaged in the business of selling insurance as the representative of an insurance company.

III.

The provisions of this Final Judgment applicable to the defendant Exchange shall apply to such defendant, its members, officers, directors, agents, employees, successors, and assigns and to those persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise.

IV.

(A) The defendant Exchange is ordered and directed, within thirty (30) days from the date this Judgment becomes final, to terminate and cancel in their entirety the following bylaws, rules and regulations:

Article IV—Section 15

Article IX—Section 1

Article IX—Section 2

Article IX—Section 6

Article IX—Section 7

Article X—All sections

Article XV—Agency Appointments Committee—Sections 1, 2, 3

Article XVI—All sections

Article XVII—In its entirety

(B) The defendant Exchange and all those acting in concert with it are enjoined and restrained from maintaining, adopting, adhering to, enforcing or claiming any rights under any bylaw, rule or regulation contrary to or inconsistent with any provision of this Final Judgment.

V.

The defendant Exchange is enjoined and restrained from adopting, entering into, maintaining, adhering to, enforcing or claiming any rights under any bylaw, rule or regulation, or any contract, agreement understanding, plan or program in concert with any member or any other person, having the purpose or effect of:

(A) Any member or any person boycotting or otherwise refusing to do business with any person;

(B) Fixing, establishing, maintaining or determining commissions or other terms or conditions for the sale of insurance;

(C) Fixing, establishing, maintaining or determining the terms or conditions for the brokerage of insurance;

(D) Any member or any person boycotting or otherwise refusing to do business with any person who appoints as agent, or does business with, any nonmember of the Exchange;

(E) Any member or any person boycotting or otherwise refusing to do business with (1) any mutual company or any participating company, or (2) any person who does business with such mutual company or participating company;

(F) Any member or any person boycotting or otherwise refusing to do business with any person who solicits insurance directly from policyholders.

VI.

Defendant Exchange is enjoined and restrained from:

(A) Inspecting or claiming the right to inspect the books or records, or otherwise policing the business activities, of any of its members or any other person;

(B) Exacting or claiming the right to exact fines or other punitive damages from any of its members or any other person;

(C) Receiving or claiming any commissions for the sale of insurance;

(D) Preventing or restricting any member of the Exchange from engaging in any business.

VII.

Defendant Exchange is ordered and directed to:

(A) Mail an exact copy of this Final Judgment to each of its members and to each insurance company represented by any member of the Exchange;

(B) Furnish to each person applying for membership in said Exchange a copy of this Final Judgment upon acceptance of his application for membership;

(C) Require as a condition of a membership in defendant Exchange that each member agree to comply with the terms of the Final Judgment;

(D) File, within forty-five (45) days from the date that this Judgment becomes final, an affidavit with the Clerk of this Court certifying that the copies of the Final Judgment have been mailed in accordance with the provisions of Subsection (A) of this Section VII.

VIII.

Nothing contained in this Final Judgment shall prevent defendant Exchange from expelling from membership any member adjudicated guilty of violating the State of Louisiana insurance laws.

IX.

For the purpose of securing compliance with this Final Judgment and for no other purpose, and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendant Exchange made to its principal office, be permitted (1) access during the office hours of the Exchange to those parts of the books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of the Exchange which relate to any of the subject matters contained in this Final Judgment, and (2) subject to the reasonable convenience of the Exchange and without restraint or interference from it to interview officers or employees of said Exchange, who may have counsel present. No information obtained by the means provided in this Section IX shall be divulged by any representative of the Department of Justice to any person other than a duly authorized employee of the Depart-

ment except in the course of legal proceedings to which the United States of America is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

X.

One year from the date this judgment becomes effective, the Government shall file in the record a report of the progress on the compliance of the Exchange and its membership with this decree. This report shall be based on an analysis of the books and records of the Exchange and the books and records of the individual members thereof. The report shall show specifically whether or not the boycotts outlawed by this decree have been continued by the membership after the illegal bylaws have been repealed by the Exchange.

XI.

Jurisdiction is retained for the purpose of enabling either party to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification or termination of any of the provisions thereof, and for the enforcement of compliance therewith and punishment of violations thereof.

XII.

Judgment is entered against the defendant Exchange for all costs to be taxed in this proceeding.

New Orleans, Louisiana, March 19th, 1957.

J. SKELLY WRIGHT
United States District Judge

APPENDIX "H".

MINUTE ENTRY
WRIGHT, J.
APRIL 10, 1957

No. 4292
CIVIL ACTION

UNITED STATES OF AMERICA

versus

NEW ORLEANS INSURANCE EXCHANGE

IT IS ORDERED that defendant's motion for new trial be and the same is hereby denied.

IT IS FURTHER ORDERED that defendant's motion to amend the Findings of Fact and Conclusions of Law be and the same is hereby granted as to Paragraphs 1, 2, 8, 9 and 23 of the Findings of Fact proposed by the defendant.

IT IS FURTHER ORDERED that defendant's motion to amend the Findings of Fact and Conclusions of Law be and the same is hereby granted as to defendant's Proposed Findings of Fact Nos. 4, 7, 15, 18, 20, 22 and 26 as herein amended as follows:

period of the so-called "moratorium" during which the state legislatures were authorized by Congress to enact comprehensive insurance codes. The Government's entire case will collapse if this Court finds that the intent of Congress, as set forth in the McCarran Act, was to permit each state to tax and regulate "the business of insurance, and every person engaged therein * * *", and that the exception depended upon by the Government counsel does not retain for the Department of Justice what the Act itself so clearly delegates to the States.

In other words, the position of the Government in this case is that the McCarran Act, which permitted the comprehensive regulation of the insurance business by each state was rendered nugatory by Subsection 3(b), quoted above, which has a garbled and confused legislative history and an extremely doubtful meaning. If the Government's contentions are correct in this case, a **conspiracy to control prices**, or a **complete monopoly of the insurance business** in a particular state would clearly fall **outside** the provisions of the Sherman Act (where the legislature of a particular state has acted to regulate the business of insurance, as the Louisiana Legislature has acted); but the Sherman Act would still **exclusively control a refusal to deal**, or so-called "boycott", **where two individuals agree not to deal with a third party** in a business transaction involving interstate commerce.

The Government theory is that there is a violation of the Sherman Act if the owners of two corner drugstores (in cooperation with the local Parent-Teachers As-

sociation) agree not to deal with a non-resident publisher of comic books so long as the publisher insists on distributing horror and sex magazines to children; or if two insurance agents representing stock companies agree that they cannot conscientiously operate a "mixed agency", representing both stock and mutual insurance companies, because of the conflicts of interest which will immediately arise. According to the Government theory this is a "boycott" subject to criminal prosecution by the Department of Justice, under the Sherman Act; whereas a conspiracy by the five largest insurance companies in the United States to fix prices would be subject exclusively to state control!

The entire foundation of the Government's position in this case rests upon an interpretation that Section 3(b) of the McCarran Act, quoted above, **added** to the prohibitions of the Sherman Act "boycott, coercion, or intimidation". It is difficult to understand how the Government can base its entire position upon a contention that the abortive Subsection 3(b) of the McCarran Act can breathe life into the Sherman Act in a case involving alleged acts of "boycott, coercion, or intimidation", whereas the Sherman Act itself contains no such language.

Stated differently, Congress has specifically authorized the Legislatures of the various states to enact comprehensive insurance codes regulating the business of insurance, and it is conceded by the Government, and was found by the District Court,[1] that Louisiana has adopted

---

[1] 148 F. Supp. 915, at page 920, footnote 17, reading: "Louisiana has a comprehensive insurance code providing for the complete regulation of the insurance industry within the State. La. R. S. 22:1-22:1734.

a completely comprehensive insurance code, even including regulation and control of acts of "boycott, coercion, and intimidation".[2] The Sherman Act does not prohibit or even refer to acts of "boycott, coercion, or intimidation", but, on the contrary, prohibits **monopoly, combinations in restraint of trade, and attempts to monopolize or restrain trade.** Consequently, if the alleged activities of the Defendant constitute a monopoly, a restraint of trade, or an attempt to monopolize or restrain trade, **such activity is regulated and controlled by the comprehensive Louisiana Insurance Code,** and is not subject to injunctive relief under the Sherman Act; and if the alleged activities of the Defendant constitute "boycott, coercion, or intimidation" **not** amounting to monopoly or restraint of trade, or attempts to monopolize or restrain trade, **such activities do not violate any provisions of the Sherman Act!**

It is difficult to comprehend how Appellee can contend that this single question is "so unsubstantial as not to need further argument", and yet that is the conclusion set forth in the opinion and closing paragraphs of Appellee's Motion to Affirm.

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[2] Louisiana Revised Statutes of 1950, Title 22, Section 1214 A. "The following are declared to be unfair methods of competition and unfair or deceptive acts and practices in the business of insurance * * *"

(4) "Boycott, coercion and intimidation. Entering into any agreement to commit or by any concerted action committing any act of boycott, coercion or intimidation resulting or tending to result in unreasonable restraint of, or a monopoly in, the business of insurance."

EFFECT OF THE SOUTH-EASTERN UNDERWRITERS CASE.

A second serious and substantial question is presented in the voluminous briefs filed in the District Court by Appellant, showing that this Court held for years in a long line of decisions, starting with *Paul v. Virginia*, 8 Wall. (U. S.) 168, that the business of insurance was not interstate commerce, and did not fall within the contemplation of the Sherman Act, but, on the contrary, was strictly subject to control and regulation by the state legislatures. In *United States v. South-Eastern Underwriters Association*, 322 U. S. 533, this Court considered a **criminal indictment** charging certain **nonresident** insurance **companies** with a conspiracy to fix arbitrary and noncompetitive premium rates, and **by that means** to restrain and monopolize trade and commerce in fire insurance. The Government contends that that decision held unequivocally and once and for all that the business of insurance **is** interstate commerce. However, it is Appellant's contention, and there is strong reason to hold, that the decision of this Court in the *South-Eastern Underwriters* case should be limited to its facts, and that in a situation such as the one involved in the present proceedings the long line of decisions represented by *Paul v. Virginia* should control.

THE RULE OF REASON.

Another most substantial question is whether or not the restraint of trade, if any existed in the present case, was either a) **substantial,** or b) **unreasonable.** Numer-

ous decisions of this Court have been cited by Appellant in the District Court to support its position that the restraint or monopoly, if any existed or was attempted in the present case, was not substantial, and was not unreasonable. If this Court should find that there was a restraint of trade or a monopoly but that such restraint a) was not substantial, or b) falls within the "Rule of Reason" so frequently adopted and applied by Your Honors, then these proceedings must be dismissed. In this connection it is significant to note that although this Court has not as yet passed directly on a factual situation such as the one involved in the present case, all of the numerous authorities, both State and Federal, cited by Appellant to the District Court, held that by-laws and practices such as those of the Defendant in the present case were **both reasonable and necessary,** and did not violate any of the State or Federal statutes involved in those cases. No final decision to the contrary, involving the rules or activities of a trade association or exchange, such as the New Orleans Insurance Exchange, were cited by Appellee in the District Court. All of these decisions cited by Appellant were completely ignored by the District Judge, and were not even commented upon by him in his extensive opinion.

OTHER SUBSTANTIAL QUESTIONS.

The Jurisdictional Statement filed in this Court by Appellant sets forth **eleven** distinct substantial questions on which the decision of this case depends, including, for

example, a consideration of whether the District Judge properly issued an injunction to restrain activities which were neither occurring nor threatened at the time the complaint was filed, or thereafter.

CONCLUSION.

We are convinced that Rule 16 of the Revised Rules of this Court, **pertaining exclusively to motions to dismiss or affirm**; does not contemplate a presentation of arguments and citations in support of Appellant's position **on the merits of the case.** Consequently, this brief has been devoted solely to pointing out a few of the extremely substantial questions on which the decision of this case depends. It is Appellant's understanding that the proper time to develop fully the arguments and authorities on the merits of the case will be after the Court has noted jurisdiction and briefs are filed in accordance with the Revised Rules of this Court.

This case involves substantial questions of a far-reaching nature, not only in the State of Louisiana, but throughout the United States. Of utmost importance will be a determination of whether the legislature of each state shall be given authority to regulate the business of insurance, as contemplated by the Congress in the McCarran Act, or whether, as contended by the Government, paramount control shall remain in Washington, by virtue of a strained construction of an abortive exception appearing in the McCarran Act.

We respectfully submit that Appellee's Motion to Affirm should be denied, and this Court should enter an order noting jurisdiction.

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Attorneys for New Orleans Insurance Exchange, Appellant.

CERTIFICATE.

I, MURRAY F. CLEVELAND, one of the attorneys for the New Orleans Insurance Exchange, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ● day of October, 1957, I served copies of the foregoing brief opposing Appellee's Motion to Affirm on the United States of America by a) depositing a copy thereof in a United States mailbox, with airmail postage prepaid, addressed to the Honorable J. Lee Rankin, Solicitor General of the United States, Washington 25, D. C., b) depositing a copy thereof in a United States mailbox, with airmail postage prepaid, addressed to the Honorable Victor R. Hansen, Assistant Attorney General of the United States, Washington 25, D. C., and c) depositing a copy thereof in a United States mailbox, with first class postage prepaid, addressed to the Honorable M. Hepburn Many, United States Attorney for the Eastern District of Louisiana, Federal Building, New Orleans, Louisiana.

MURRAY F. CLEVELAND,
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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 399

NEW ORLEANS INSURANCE EXCHANGE, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1 (c), of the Revised Rules of this Court, appellee moves that the judgment of the district court be affirmed on the ground that the questions upon which decision of the cause depends are so unsubstantial as not to require further argument.

STATEMENT

This is a direct appeal from the final judgment entered by the district court on March 19, 1957 (J. St. 46), adjudging that appellant had combined and conspired with its members and others to restrain and to monopolize, and had attempted to monopolize, interstate commerce in fire, casualty, and surety insurance, in violation of Sections 1 and 2 of the Sherman Act. The complaint was filed in January 1954,

and appellant's motion to dismiss was denied in November 1954 (*id.*, pp. 30–31). After trial, the court filed an opinion holding that the United States was entitled to a decree (*id.*, 13–24), and also filed separate findings of fact and conclusions of law (*id.*, 33–45).

The major pertinent facts, as set forth in the district court's findings of fact, are as follows:

Appellant is an association composed of about 130 agent members engaged in selling fire, casualty, and surety insurance in the New Orleans area, i. e., the Parishes of Orleans, Jefferson, and St. Bernard, Louisiana (fngs. 1–2). Its agent members represent 220 stock fire, casualty, and surety insurance companies, which include 90% of all companies of this character having assets in excess of $50,000,000 (fngs. 2, 9). During the period 1951 through 1954, the member agents wrote 65.1% of all multiple lines of insurance written by fire and casualty companies in the New Orleans area, 81.3% of the fire insurance written in that area, 67.4% of the casualty insurance (excluding accident and health) written in that area, and 98.1% of the surety business written in the area (fng. 9). The premiums on the business annually written by members range from approximately $25,000,000 to $30,000,000 (*ibid.*).

In the New Orleans area, "virtually all" stock fire, casualty, and surety insurance companies sell through agents rather than branch offices (fng. 4). The agents control to a great extent the placing of such insurance (fng. 7). The policyholder places business with the agent and the choice of companies is gener-

ally left to him, and personal contact with the policyholder is confined to the agent (*ibid.*). A company's success is thus directly related to its opportunity to secure representation by reliable, skillful agents having large, established clienteles (*ibid.*).

The Exchange's bylaws, to which all members must adhere, are rigidly enforced and policed (fngs. 20–23). Under the bylaws, members of the Exchange agree to boycott—not to represent—companies which appoint agents who are not members of the Exchange for the sale in the New Orleans area of fire, casualty or surety insurance, nonstock insurance companies, and companies which solicit insurance directly from the policyholder (fngs. 13, 15–16). The members agree to accept business from a nonmember agent or a nonstock company only if the facilities of all Exchange members have been exhausted and an affidavit to that effect has been filed with the Secretary of the Exchange; and they agree that no commission shall be paid on such business and that 10% of the net premiums involved shall be paid to the Exchange (fng. 14).

As a result of the Exchange's boycott, insurance companies operating in the New Orleans area have been denied a free choice in the selection of agents (fng. 35). Every company electing to place insurance through an Exchange member has been prevented from being represented by any nonmember agent and from selling insurance directly to the public through its salaried representatives (fngs. 26, 38–39). All insurance companies represented by nonmember agents in the New Orleans area, all nonstock com-

panies, and all companies which solicit insurance directly from the public have been prevented from obtaining representation by Exchange members and have been denied access to a substantial part of the market for fire, casualty, and surety insurance (fngs. 36–37). The Exchange and its members have "controlled and adversely affected the business operating policies" of fire and casualty insurance companies, not only in their choice of agents but also in "various other vital phases of their operations" (fng. 40).

The boycott has likewise "hampered" nonmember agents and caused them "substantial financial loss" (fng. 30). They are unable to represent any of the 220 stock companies represented by member agents, and these companies offer the only available facilities for writing certain risks in the fire, casualty and surety field (fng. 29).

The "great majority" of fire and casualty companies doing business in the New Orleans area maintain their home offices outside of the State of Louisiana. There is a steady flow of supplies, including policy forms, from the home offices to the local agents. The latter make regular reports and mail premiums to the out-of-state offices. They, in turn, remit to the agents checks in payment of claims. The result is a "continuous flow of business transactions" across state lines. (Fng. 8.)

In its opinion the court stated that the evidence established that the effect of the boycott in which the appellant Exchange and its members are engaged was that practically all the major stock companies sell exclusively through Exchange members although some of

the same companies sell in other areas through agents representing all types of insurance companies, including mutuals, and some sell in other areas directly to the public (J. St. 16). The practices, the court said, "are essentially the same, in purpose and effect, as those denounced as violative of the Sherman Act in" *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457 (*id.*, 19). The court also noted that this Court has explicitly stated that restraints imposed by group boycotts are unreasonable *per se* and thus illegal under Section 1 of the Sherman Act (*id.*, 17–18). But the court found it unnecessary to decide the present case "on a per se basis", because the restraints which were imposed "not only tended to but actually did impose unreasonable restraints on interstate commerce" (*id.*, 18–19). Summarizing appellant's combination and conspiracy, the court said (*id.*, 21):

> The result, therefore, is that not only are the mutuals and other companies operating outside the Exchange excluded from a substantial market [approximately 75 per cent of the concerned insurance purchased in the New Orleans area] by a group boycott effected through the use of the dominant position of the Exchange, but companies allowed to do business through the Exchange outlets are actually controlled in their method of doing business in that, in addition to being denied the right to deal directly with the public, they must participate in the Exchange boycott of nonmember agencies. Not only are nonmember agencies restricted in their operations by a group boycott effected through the use of the dominant position of the Exchange,

but the member agencies themselves are prisoners, sometimes unwilling prisoners, of their own rules, for they, too, are limited in their operations under pain of expulsion and boycott.

ARGUMENT

The jurisdictional statement sets forth (J. St. 4–7) eleven questions which it states are presented by the appeal, but it does not show or attempt to show error in the decision of any of these questions. . . .

The questions raised as to whether appellant's conduct violated the Sherman Act are, we submit, wholly without substance. The first of these questions, labeled A, is whether appellant's activities are "beyond the scope of the Sherman Act" in view of the holding in *Paul* v. *Virginia,* 8 Wall. 168, that "insurance is not interstate commerce". This question is set at rest by *United States* v. *South-Eastern Underwriters Assn.,* 322 U. S. 533, which held that the business of insurance, when carried on in substantial volume across state boundaries, is interstate commerce and subject to the Sherman Act.

Question E, whether Sections 1 and 2 of the Sherman Act prohibit combinations and conspiracies to restrain or monopolize trade and commerce and attempts to monopolize, rather than "boycott, coercion, or intimidation" as such, is not, on the facts here, presented in this case. The district court expressly bottomed its decision on agreement to boycott and group boycotting. It said (J. St. 21–22): "It must be remembered that in suit here is a group boycott, participation in which was required of every Exchange member by its bylaws. While an individual agency may

have the right to boycott another agency or an insurance company, a concerted refusal to deal brings the combination within the condemnation of the Sherman Act."

Questions F and J, whether there was a showing that appellant's activities affected third parties or affected "substantial" interstate commerce, are disposed of by the following from the opinion below (J. St. 18–19):

> In fact, this defendant, through the dominant position of its membership, sits astride the stream of interstate commerce in insurance in the New Orleans area and directs its flow. It allows the large stock companies access to its outlets on condition that those companies participate in its group boycott of nonmember agencies. It refuses to allow any part of the 75 per cent of the insurance which it controls to move in the direction of mutuals or direct writers, and it relegates the numerically superior nonmember agencies to the discriminatory position of scrambling for the remaining 25% of the business while excluding them from placing it with the major stock companies controlled by the Exchange.

Question K, whether appellant's activities are reasonable within the so-called "rule of reason", simply raises the question whether this Court should repudiate a consistent line of decisions running from *Montague & Co.* v. *Lowry,* 193 U. S. 38, 45, to *Times-Picayune Publishing Co.* v. *United States,* 345 U. S. 594, 625, including the *Fashion Originators' Guild* case and cases there cited (312 U. S. at 465–466).

We submit that questions B, C, and D, which relate to the application of the McCarran-Ferguson Act, are likewise without merit. Section 3 (b) of that Act provides: "Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." The substance of the questions raised is whether enactment by the State of Louisiana of legislation regulating insurance companies as to such conduct makes the Sherman Act *inapplicable* to boycotting agreements and boycotts, notwithstanding the express and unambiguous declaration of Section 3 (b) of the McCarran-Ferguson Act that nothing contained in that Act shall have such effect. The very purpose of the section was to exclude boycotting agreements, etc., from the limitations respectively imposed by Sections 3 (a) and 2 (b) of the Act, namely, that until June 30, 1948, the Sherman Act shall not apply to the business of insurance, and that after that date the Sherman Act shall be applicable to this business "to the extent that such business is not regulated by State law".

As the district court said, "[t]he legislative history of Section 3 (b) affirms what its language plainly says" (J. St. 24). Section 3 (b) of the original bill provided that nothing contained "in this section" shall make the Sherman Act inapplicable to boycotts, etc. Senator Murdock suggested that the word "Act" be substituted for "section" so that "we would not be limited merely to that one section", and Senator Ferguson consented to this change "because I am of the opinion that that was the intention of all concerned"

(91 Cong. Rec. 479; see *id.* at 481). The change was made in conference (H. Rep. 213, 79th Cong., 1st Sess., p. 2), and in that form was passed by both Houses.[1]

The Senate Judiciary Committee report on the bill declared that although Section 3 (a) temporarily suspended the Sherman Act to enable the States to consider legislation during the period of suspension, under Section 3 (b) the Sherman Act prohibitions against boycotts, etc., are "at no time" suspended and "remain in full force and effect" (S. Rep. 20, 79th Cong. 1st Sess., pp. 2–3). The Conference Committee emphasized that such acts remain "subject to the operation of the suspended statutes" even during the moratorium period provided in Section 3 (a) (H. Rep. 213, 79th Cong. 1st Sess., p. 3). Senator Ferguson, co-sponsor of the bill and also a Senate manager, asserted that no "State could pass a law permitting an agreement or an act of boycott, coercion, or intimidation" (91 Cong. Rec. 479, 1443).

The remaining questions presented, G, H, and I, scarcely deserve notice. G and I raise issues as to evidentiary or procedural rulings calling for exercise of the trial court's discretion, and appellant neither shows, nor under the facts could it show, any abuse of discretion. Question H is whether the judgment enjoins activities neither occurring nor threatened when the complaint was filed or subsequently. The case, however, presents no such issue. The district court ruled that "there can be no injunction issued to restrain a past activity which is no longer extant unless

[1] As the section appears in the United States Code (15 U. S. C. 1013 (b)), the word "chapter" is used instead of "Act".

there is immediate proof that the past activity again will be resorted to" (Tr. 18–19).

CONCLUSION

The decision below is correct, and this appeal presents no substantial question. It is therefore respectfully submitted that the judgment of the district court should be affirmed.

J. LEE RANKIN,
Solicitor General.
VICTOR R. HANSEN,
Assistant Attorney General.
CHARLES H. WESTON,
ERNEST L. FOLK III,
Attorneys.

SEPTEMBER 1957.

U. S. GOVERNMENT PRINTING OFFICE: 1957

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 399

NEW ORLEANS INSURANCE EXCHANGE,
Appellant

vs.

UNITED STATES OF AMERICA,
Appellee

On Appeal from the United States District Court for the Eastern Division of Louisiana, New Orleans Division

AMICUS CURIAE BRIEF ON BEHALF OF THE STATE OF TEXAS

WILL WILSON
Attorney General
State of Texas

C. K. RICHARDS
Assistant Attorney General

IN THE

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NEW ORLEANS INSURANCE EXCHANGE,
Appellant

vs.

UNITED STATES OF AMERICA,
Appellee

On Appeal from the United States District Court for the Eastern Division of Louisiana, New Orleans Division

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AMICUS CURIAE BRIEF ON BEHALF OF THE STATE OF TEXAS

To The Honorable Supreme Court of The United States:

The State of Texas, acting by and through Will Wilson, its Attorney General, respectfully submits its brief as amicus curiae upon the question as to whether the taxation and regulation of the business of insurance is subject to State control where a state,

such as Texas, has acted in accordance with the authority delegated to it by the Congress in the McCarran-Ferguson Act, 15 U.S.C. 1011-1015.

The State of Texas is gravely concerned as to whether its State Board of Insurance and Commissioner of Insurance may regulate the insurance business of Texas in accordance with the comprehensive Insurance Code of Texas, guided by the opinions of the Attorney General of Texas interpreting its provisions, or whether such regulation may be continued without interference by the Federal Government only if conducted in accordance with the views of the Antitrust Division of the Department of Justice. Texas has anti-trust laws as comprehensive as those of the Federal Government.[1] The Attorney General of Texas and the District and County Attorneys of Texas are charged with the enforcement of its anti-trust laws[2] and all citizens of the State have recourse to such laws for actual and exemplary damages for injury resulting from any violation of the anti-trust laws of Texas.[3]

There now exists an uncertainty as to whether the decision in *Miley v. John Hancock Mutual Life In-*

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[1] The anti-trust laws of Texas, both civil and criminal, are set forth verbatim in the Appendix to this brief.

[2] The Attorney General of Texas has vigorously prosecuted violations of the anti-trust laws. A few examples are: *State v. Standard Oil Co.* 130 Tex. 313, 107 S.W. 2d 550 (Sup. Ct. 1937); *Ford Motor Co. v. State*. 142 Tex. 5, 175 S.W. 2d 230 (Sup. Ct. 1943); *Arkansas Fuel Oil Co. et al v. State*, 154 Tex. 573, 280 S.W. 2d 723 (Sup. Ct. 1955); *State v. Swift and Co.*, 187 S.W. 2d 127 (Civ. App., error refused 1945).

[3] *Cline v. Insurance Exchange of Houston*, 140 Tex. 175, 166 S.W. 2d 677 (Sup. Ct. 1943).

surance Co., et al., 148 F. Supp. 299, aff. 242 F. 2d 758, cert. den. October 14, 1957, correctly declares the law in holding that in view of the McCarren-Ferguson Act, Federal regulation is precluded in States which, like Texas, have comprehensive and complete laws regulating the insurance business, together with anti-trust laws with sweeping prohibitions against agreements or combinations in restraint of trade.

The State Board of Insurance of Texas determines and fixes proper rates of premiums which must be adhered to in insuring motor vehicles and workmen's compensation insurance risks. If insurance companies and agents fail to adhere to such fixed rates they are in violation of State law. Insurance companies may enforce rates with respect to fire and allied lines and surety bonds only when such rates have been duly filed with and approved by the Board. In addition, policy contracts for fire and allied lines, workmen's compensation insurance, motor vehicle and surety bonds must be written on the policy contract forms prescribed by the Board. Even in the field of health and accident insurance there are numerous compulsory provisions which must be inserted in each policy contract.

The State of Texas is submitting, in connection with this brief, copies of the Texas Insurance Code (1957 Ed.) which is published by the State Board of Insurance. This Honorable Court will note that the printed Code is a book containing 444 pages of laws applicable to the business of insurance, exclusive of the anti-trust laws. For ready reference a list of

some of the articles pertaining to rate and policy form control are shown below.[4]

Articles 1.04 (b) (c) and 1.10 set forth the duties of the State Board of Insurance and the Commissioner of Insurance. A casual reading of these articles discloses that the Board and the Commissioner have sweeping control of insurance companies as to whether they should be permitted to transact business within the State of Texas, including the right to suspend the entire business of any company within the State which is found to be in ". . . non-compliance with any provision of the laws relative to insurance . . ." The Board and the Commissioner have not only very broad power in the control of rates and policy forms but also like control in determing whether insurance companies have proper reserves, impairment of surplus, etc. In addition, the Board and the Commissioner are required to report to the Attorney General of the State any violations of law which may be discovered in the exercise of the comprehensive control of the insurance business.

Articles 2.01, et seq., give the Board and the Commissioner exclusive control over the incorporation of insurance companies, including the determination as

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[4] Art. 5.01. Board required to fix motor vehicle rates (p. 95); Art. 5.06. Board required to prescribe Motor vehicle policy forms. Approval by endorsements required. (p. 97). Art. 5.15. Fidelity, Guaranty and Surety bond rates must have Board approval based on factors specified by law. (p. 100) Arts. 5.25 and 5.26. Maximum rates fixed for fire insurance with deviation below fixed rates under certain conditions. (p. 105). Art 5.35. Board prescribes uniform fire policies which all companies must use. (p. 110). Art. 5.55. Workmen's compensation rates fixed by Board. (p. 119). Art. 5.56. All companies required to use uniform policy forms prescribed by Board. (p. 120).

to whether such companies are properly qualified to continue in business, how dividends shall be paid, and all other matters in the conduct of their business. Likewise, foreign or out-of-state companies must obtain permits to do business in Texas and subject themselves to the same requirements as domestic companies, which includes control as to reserves, investments, and ownership of real estate. Articles 5.68, et seq., set forth the provisions of the Penal Code of Texas which pertain only to insurance business. It will be noted that penalties are provided for any failure to obey the insurance laws and regulations issued by the Board and the Commissioner. The penal provisions are in addition to the anti-trust laws of Texas noted above.

There now exists a great uncertainty and confusion as to whether the Board of Insurance and the Commissioner of Insurance, together with the Attorney General of Texas, may determine finally whether the insurance business is being properly transacted in the State of Texas, and whether the insurance laws of Texas and regulations promulgated pursuant thereto can be enforced in accordance with the interpretation of such laws by the Board and Commissioner and the Attorney General of Texas without interference by the Antitrust Division of the Department of Justice.

The McCarran-Ferguson Act undoubtedly was the result of congressional effort to return to the states the regulation and taxation of the insurance business (provided they had comprehensive, adequate statutory regulation) as a result of *United State v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944). The affirmance of *Miley v.*

John Hancock Mutual Life Insurance Co., 148 F. Supp. 299, aff. 242 F. 2d 758, cert. den. October 14, 1957, apparently declared the law to be that states which, like Massachusetts and Texas, had comprehensive insurance regulation, would be premitted to enforce their laws without interference from the Department of Justice. However, affirmance of the *New Orleans Insurance Exchange* case, 148 F. Supp. 915, seems to be squarely in conflict with the views expressed in the *Miley* case.

The State of Texas is now confronted with this realistic problem. The State Board of Insurance fixes rates with respect to certain lines of insurance and different rates may be applied to certain other lines only after approval by the Board. The Attorney General of Texas will prosecute vigorously any company which fails or refuses to comply with the rates provided by law. The question is: After the State of Texas, through its State Board of Insurance and the Attorney General, enforces rates and other regulations of the insurance business, will those who comply with such compulsory regulation be prosecuted by the Antitrust Division of the Department of Justice as in the *South-Eastern* case?

The State of Texas, through its Attorneys General, has for many years enforced the provisions of its anti-trust laws in the case of insurance companies. At the time of the enactment of the anti-trust laws in 1889 the business of insurance was not specifically named in the statutory provisions. In 1893 the Supreme Court of Texas, in *Queen Insurance Company v. State ex rel Attorney General*, 86 Tex. 250, 24 S.W. 397, so held, and in 1903 amendatory legislation provided for prosecution of anti-trust violations by in-

surance companies. *Griffin v. Palatine Insurance Co.*, 238 S.W. 637 (Comm. App. 1922).[4]

Although the laws of Texas provide specifically for prosecution in the case of boycotts (Art. 7428, Vernon's Civil Statutes, and Art. 1634, Vernon's Penal Statutes), would a successful prosecution of a violator of either or both of these statutes preclude similar action against the offender by the Department of Justice? We think not.

The State of Texas has endeavored to enact comprehensive laws for the regulation of the insurance business. In view of the decisions in *Crafts v. Federal Trade Commission*, 244 F. 2d 882 (1957) and *American Hospital and Life Insurance Co. v. Federal Trade Commission*, 243 F. 2d 719 (1957) by the Courts of Appeal for the 9th and 5th Circuits, respectively, the 55th Legislature of Texas in 1957 enacted a broad and comprehensive statute governing unfair competition and unfair practices set forth as Article 21.21 of the Texas Insurance Code at pages 285-289 of the Code. Section 1 of the Act declares that the purpose of the Act is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the McCarran-Ferguson Act. The State of Texas, through its Attorney General, will vigorously prosecute all violations of this statutory provision which are brought to his attention.

Therefore, the State of Texas respectfully requests this Honorable Court to grant a rehearing in the *New Orleans Insurance Exchange* case and declare

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[4] For prosecution of insurance companies under the anti-trust laws, see *Potomac Fire Insurance Co. v. State*, 18 S.W. 2d 929 (Civ. App. 1929, error refused).

the law as to whether the McCarran-Ferguson Act restores to the State the right to enforce, free from Federal interference, their laws which afford complete regulation of the insurance business. The State of Texas respectfully suggests that, if those who observe and conform to State regulation are subject to prosecution for violation of Federal anti-trust laws, in the event the Anti-trust Division of the Department of Justice does not agree with the interpretation and enforcement of State law, the Attorneys General and regulatory agencies of the State concerned with enforcement should know it. The State Board of Insurance of Texas and the Attorney General of Texas should know whether their interpretation and enforcement of State law may be accepted by the insurance business with safety, or whether they should enforce only such compulsory regulation as will meet with the approval of the Anti-trust Division. The State of Texas should not be in a position of enforcing compliance with its regulations, and then find that such compliance is rewarded by prosecution for violation of Federal law.

The State of Texas submits that the question of law discussed in this amicus curiae brief is, of itself, so grave and substantial as to justify its consideration by this Court on its merits.

Respectfully submitted,

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APPENDIX

The following articles are statutory provisions contained in Title 126 (Trusts-Conspiracies Against Trade) contained in Vernon's Texas Statutes (1948 Ed. Vol. 1).

"Article 7426. 7796 'Trusts'

"A 'trust' is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or either two or more of them for either, any or all of the following purposes:

"1. To create, or which may tend to create, or carry out restrictions in trade or commerce or aids to commerce or in the preparation of any product for market or transportation, or to create or carry out restrictions in the free pursuit of any business authorized or permitted by laws of this State.

"2. To fix, maintain, increase or reduce the price of merchandise, produce or commodities, or the cost of insurance, or of the preparation of any product for market or transportation.

"3. To prevent or lessen competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or *the business of insurance*, or to prevent or lessen competition in aids to commerce, or in the preparation of any product for market or transportation.

"4. To fix or maintain any standard or figure whereby the price of any article or commodity of merchandise, produce or commerce, or

the cost of transportation, or *insurance*, or the preparation of any product for market or transportion, shall be in any manner affected, controlled or established.

"5. To make, enter into, maintain, execute or carry out any contract, obligation or agreement by which the parties thereto bind, or have bound themselves not to sell, dispose of, transport or to prepare for market or transportation any article or commodity, or *to make any contract of insurance* at a price below a common standard or figure or by which they shall agree in any manner to keep the price of such article or commodity or *charge for* transportation or *insurance*, or the cost of the preparation of any product for market or transportation at a fixed or graded figure, or by which they shall in any manner affect or maintain the price of any commodity or article or *the cost of* transportation or *insurance*, or the cost of the preparation of any product for market or transportation between them or themselves and others, to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or *business of* transportation or *insurance*, or the preparation of any product for market or transportation, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or purchase of any article or commodity, or charge for transportation or *insurance* or charge for the preparation of any product for market or transportation whereby its price or such charge might be in any manner affected.

"6. To regulate, fix or limit the output of any article or commodity which may be manufactured, mined, produced or sold, or *the amount*

of insurance which may be undertaken, or the amount of work that may be done in the preparation of any product for market or transportation.

"7. To abstain from engaging in or continuing business, or from the purchase or sale of merchandise, produce or commodities partially or entirely within the State of Texas, or any portion thereof." (p. 2081)

"Art. 7427. 7797 'Monopoly' defined

"A monopoly is a combination or consolidation of two or more corporations when effected in either of the following methods:

"1. When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or where such common management or control tends to create a trust as defined in the first article of this chapter.

"2. Where any corporation acquires the shares or certificates of stock or bonds, franchise or other rights, or the physical properties or any part thereof, of any other corporation or corporations, for the purpose of preventing or lessening, or where the effect of such acquisition tends to affect or lessen competition, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise." (p. 2082)

"Art. 7428. 7798 Conspiracies against trade

"Either or any of the following acts shall constitute a conspiracy in restraint of trade:

"1. Where any two or more persons, firms, corporations or associations of persons, who are

engaged in buying or selling any article of merchandise, produce or any commodity, enter into an agreement or undertaking to refuse to buy from or sell to any other person, firm, corporation or association of persons, any article of merchandise, produce or commodity.

"2. Where any two or more persons, firms, corporations or associations of persons, shall agree to boycott or threaten to refuse to buy from or sell to any person, firm, corporation or association or persons for buying from or selling to any other person, firm, corporation or association of persons.

"3. Where any two or more persons, firms, corporations or associations of persons shall agree to boycott, or enter into any agreement or understanding to refuse to transport, deliver, receive, accept, erect, assemble, operate, use or work with any goods, wares, merchandise, articles or products of any other person, firm, corporation or association of persons; provided, however, that this sub-division of this Article shall not be construed to apply to an agreement between employees to terminate their employment, or to refuse to transport, deliver, receive, accept, erect, assemble, operate use or work with the goods wares, merchandise, articles or products of their immediate employer unless such refusal is intended or calculated to induce, or shall have the effect of inducing, such employer to refrain from purchasing or from otherwise acquiring goods, wares, merchandise, articles or products from any person, firm, corporation or association of persons." (p. 2083)

The following articles are statutory provisions contained in Title 19 (Trusts and Conspiracies), Vernon's Texas Statutes (1948 Ed. Vol. 2). Article 1632 defining "Trusts" is identical in language with Article 7426, Vernon's Texas Civil Statutes, *supra*. Article 1633 defining "Monopoly" is identical with Article 7427, Vernon's Texas Civil Statutes, *supra*, and Article 1634, Vernon's Penal Code, defining "Conspiracy in restraint of trade" is identical with Article 7428, Vernon's Texas Civil Statutes.

"Art. 1635. [1466] Punishment

"Whoever violates any provision of this chapter shall be confined in the penitentiary not less than two nor more than ten years." (p. 340)

"Art. 1637. [1470] Agreement to form trust, monopoly, etc.

"If any person shall enter into an agreement or understanding of any character to form a trust, or to form a monopoly, or to form a conspiracy in restraint of trade, as these offenses are defined to this chapter or shall form a trust, monopoly or conspiracy in restraint of trade, or shall be a party to the formation of a trust or monopoly or conspiracy in restraint of trade, or shall become a party to a trust or monopoly or conspiracy in restraint of trade, or shall do any act in furtherance of aid to such trust or monopoly or conspiracy in restraint of trade, he shall be confined in the penitentiary not less than two nor more than ten years." (p. 340).

"Art. 1638. [1471] Operating in violation of this law

"If any person, shall, as a member, agent, employe, officer, director or stockholder of any business, firm, corporation or association of persons, form, in violation of the provisions of this chapter, or shall operate, in violation of such provisions, any such business, firm corporation or association formed in violation of this chapter, or shall make any sale, or purchase, or any other contract, or do business for such business, firm, corporation or association, or shall do any other act which has the effect of violating or aiding in the violation of any provision of this chapter, or shall, with the intent or purpose of driving out competition or for the purpose of financially injuring competitors, sell within this State at less than cost of manufacture or production, or sell in such a way or give away within this State, products for the purpose of driving out competition or financially injuring competitors engaged in a similar business, or give secrete rebates on such purchase for the purpose of the aforesaid, he shall be confined in the penitentiary not less than two nor more than ten years." (p. 340)

"Art. 1639 [1472] Persons outside State liable

"If any person, shall, outside of this State, do anything which, if done within this State, would constitute the formation of a trust or monopoly or conspiracy in the restraint of trade, as defined in this chapter, and shall cause or permit the trust or monopoly so formed by him to do business within this State, or shall cause or permit such trust, monopoly, or conspiracy in restraint of trade to have any operation or effect

within this State, or, if such trust, monopoly or conspiracy in restraint of trade, having been formed outside of said State, any person shall give effect to such trust, monopoly or conspiracy in this State, or he shall do anything to help or aid it doing business in this State, or otherwise violate the anti-trust laws of this State, or if any person shall buy or sell or otherwise make contracts for or aid any business, firm, corporation or association of persons, formed or operated in violation of any provision of this chapter, or so formed or operated as would be in violation of the laws of this State, if it had been formed within this State, shall be confined in the penitentiary not less than two nor more than ten years." (p. 340)

"Art. 1640. [1473] Forming trusts, etc.

"If any person, employe, agent, stockholder, or officer of any person, firm, association of persons, or corporation, now doing business in this State, have formed a trust, or monopoly, as defined in this chapter, or have formed a conspiracy in restraint of trade, as defined in this chapter, or shall do or perfor many act of any character to carry out such trust, monopoly or conspiracy in restraint of trade, such person, employe, agent, stockholder, or officer, shall be confined in the penitentiary not less than two nor more than ten years." (p. 341)

SUPREME COURT, U.S.

FILED

DEC 5

JOHN T. PEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 399

NEW ORLEANS INSURANCE EXCHANGE,
Appellant

v.

UNITED STATES OF AMERICA,
Appellee

On Appeal from the United State District Court for the Eastern District of Louisiana, New Orleans Division

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Brief on behalf of the State of Louisiana, as Amicus Curiae.

JACK P. F. GREMILLION,
Attorney General of Lousiana

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INTEREST OF THE SOVEREIGN STATE OF LOUISIANA

This case raises squarely the vital issue of whether or not the regulation of the business of insurance is subject to state control, where the state has acted in accordance with the authority specifically delegated to it by the Congress in the McCarran-Ferguson Act, 15 U.S.C. 1011-1015.

The same McCarran-Ferguson Act, involving attempts by the Federal Trade Commission to establish its jurisdiction over the regulation of insurance advertising, is presently pending before this court on writs of certiorari. It is admitted by all parties that these two cases, *Federal Trade Commission v. American Hospital and Life Insurance Company*, and *Federal Trade Commission v. National Casualty Company*, are extremely important test cases. The instant case involves just as important an issue as exist in the American Hospital case and the National Casualty case, it being simply another facit of the

same issue and question of applicability and affect of the McCarran-Ferguson Act.

The determination of this issue is of critical importance to the State of Louisiana and to every other individual state, because the effect of the decision of the District Court in the instant case is to thwart the expressed intention of the Congress when it enacted the McCarran-Ferguson Act for the specific purpose of alleviating the chaos which resulted from the decision in *United States v. Southeastern Underwriters Association, et al*, 322 U.S. 533.

This Court has summarily granted the Government's motion to affirm, without permitting briefs or argument on the merits of the case. As a result of this action the State of Louisiana and various other parties vitally interested and affected by the decision of the lower court were not given an opportunity to express themselves and to raise certain points in connection with the issues of this case all of which affects not only the insurance industry in the State of Louisiana but in the entire United States as well.

ARGUMENT

In a long line of decisions, starting with *Paul v. Virginia*, 8 Wall (U.S.) 168, this Court held that the business of insurance did not fall within the contemplation of the Sherman Act, but on the contrary, was exclusively subject to control and regulation by the several states. *Ducot v. Chicago*, 10 Wall (U.S.) 410 (1870); *Liverpool etc. Ins. Co. v. Oliver*, 10 Wall (U.S.) 566 (1871); and *Fire Ass'n. of Phila. v. New York*, 119 U.S. 110 (1886); *Hooper v. California*, 155 U.S. 648; *Noble v. Mitchell*, 164 U.S. 367, *Orient Ins. Co. v. Daggs*; 172 U.S. 557; *New York L. Ins. Co.*

v. Cravens, 178 U.S. 389; *Nutting v. Massachusetts*, 183 U.S. 553; *New York L. Ins. Co. v. Deer Lodge County*, 231 U.S. 495; *Northwestern Mut. L. Ins. Co. v. Wisconsin*, 247 U.S. 132; *National Union F. Ins. Co. v. Wanberg*, 260 U.S. 71, *Bothwell v. Buckbee Meers Co.*, 275 U.S. 274; *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389; *O'Gorman and Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251; *Fidelity Mutual Life Ins. Ass'n. v. Mettler*, 185 U.S. 301; *Iowa Life Ins. Co. v. Lewis*, 187 U.S. 335; *Farmers & Merchants Ins. Co. v. Dabney*, 189 U.S. 301; *Osborn et al v. Ozlin, et al*, 310 U.S. 53; *Hoopeston Canning Co. et al, v. Cullen*, 318 U.S. 313.

The results of the cases cited above show conclusively that the states have long had power to regulate and have regulated interstate commerce in insurance. There has developed a tremendous body of state laws regulating the insurance business. Insurance has long been recognized as a business affected with a public interest and over the years it came to be extensively regulated by state law. It appears obvious that whatever regulation of the insurance business there was at the time this court ruled in the case of *United States v. Southeastern Underwriters Association*, 322 U.S. 533 (1944), such was state regulation.

This state regulation had application not only to local companies doing business entirely intrastate but also to companies domiciled elsewhere doing business interstate. In sum there can be no doubt that state regulation was astride the interstate aspects of the insurance business. See Richards on Insurance (5th ed. 1952), Sections 41-44. The decision in the Southeastern Underwriters case recognizing insurance as commerce did not change the quality or nature of the

activities and if the insurance activities were interstate commerce after the Southeastern Underwriters case then it can not be denied that they were in fact, interstate commerce prior to the Southeastern Underwriters case in the states wherein such activities were regulated. These state regulatory activities existing long prior to the Southeastern Underwriters case were in fact regulations of interstate commerce. This was the power which the states had and used prior to the Southeastern Underwriters case and which Congress intended and did restore by the McCarran Act.

It cannot be seriously questioned that the Congress has the power to permit the states to regulate interstate commerce. This doctrine, known as the doctrine of Congressional consent, is included in the plenary power of Congress over interstate commerce and has been followed in so many cases as to be now well settled in the law. *Leisy v. Hardin*, 135 U.S. 100 (1890); *Re Rahrer (Wilkerson v. Rahrer)*, 140 U.S. 545 (1891); *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U.S. 311 (1917); *Whitfield v. Ohio*, 297 U.S. 431 (1936); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945); *International Shoe Co. v. Washington*, 326 U.S. 310, 315 (1945); *Kentucky Whip & Collar Co. v. Illinois Central Railroad Co.*, 299 U.S. 334 (1937); *Hooven & Allison v. Evatt*, 324 U.S. 652 (1945).

In 1944 the long established and intricate system of state regulation of the business of insurance was convulsed by the decision in *United States v. Southeastern Underwriters Association*, 322 U.S. 533. This decision discarded the long line of decisions represented by *Paul Virginia*, and declared that the business of insurance when conducted across state lines

involved interstate commerce and was, therefore, subject to Federal regulatory statutes, such as the Sherman Act.

The following year the Congress attempted to set at rest the critical problems raised by this decision throughout the nation by passing the McCarren-Ferguson Act, 15 U.S.C. 1011-1015, which in the introductory section declared that "*the continued regulation and taxation by the several States of the business of insurance is in the public interest*".

We quote the McCarran-Ferguson Act, 15 U.S.C. 1011-1015 in full for the court's convenience in Appendix "A" attached hereto.

It has been established that Congress may consent to the states regulation of interstate commerce. It has also been established that the states have long had power to regulate and have long regulated interstate commerce in insurance. The question remains whether Congress has, in the McCarran Act, given its consent to regulation by the states of interstate insurance activities.

The answer has been furnished by the Supreme Court in *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946). There the McCarran Act was alleged to be ineffective to give the state of South Carolina power to tax interstate commerce. The Court held that the McCarran Act did give the state such power. The purpose of the McCarran Act was enunciated by the Court as follows (pp. 429-431):

> "Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of

insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation. The other was by declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it 'shall be subject to' the laws of the several states in these respects.

"Moreover, in taking this action Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that they differ greatly in the scope and character of the regulations imposed and of the taxes exacted; and of the further fact that many, if not all, include features which, to some extent, have not been applied generally to other interstate business. Congress could not have been unacquainted with these facts and its purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these variations.

" * * * it clearly put the full weight of its power behind existing and future state legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it, subject only to the exceptions expressly provided for."

In *Wilburn Boat Company v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955), in which this Court declined to apply Federal admiralty rules to the in-

terpretation of a maritime insurance policy, Mr. Justice Black, in reviewing the enactment and effect of the McCarran-Ferguson Act, made the following statements, at pages 319-320:

> "Passage of the bill followed *United States v. Southeastern Underwriters Association*, supra, holding that, despite the Constitutional Doctrine embodied in the *Paul v. Virginia* line of cases, Congress had power under the Constitution to regulate interstate insurance transactions. In the *South-Eastern* case, however, all the opinions had emphasized the historical fact that states had always been free to regulate insurance. The measure Congress passed shortly thereafter, known as the McCarran Act, was designed to assure that existing state power to regulate insurance would continue.
>
> Under our present system of diverse state regulations, which is as old as the Union, the insurance business has become one of the great enterprises of the Nation. Congress has been exceedingly cautious about disturbing this system, even as to marine insurance where Congressional power is undoubted. We, like Congress, leave the regulation of marine insurance where it has been, with the States".

Following the law as settled by the above cited decisions of this Court, the Courts of Appeals have acted with complete unanimity in holding that under the McCarran-Ferguson Act, the right to regulate the business of insurance is reposed in the states, and in those states which have adopted regulations, the Sherman Act, the Clayton Act and the Federal Trade Commission Act are not applicable.

In *North Little Rock Transportation Co. v. casualty Reciprocal Exchange*, 181 F. 2d 174 (1950), the Court of Appeals for the 8th Circuit, in holding that the Sherman Act was not applicable, since Arkansas had by statute regulated the fixing of insurance rates, said (at page 176):

> "The purpose of the McCarran Act was to permit the States to continue the regulation of the business of insurance, unhampered, to the extent provided by the Act, by federal legislation relating to interstate commerce".

Application for a writ of certiorari to review that decision was denied by this Court, 340 U.S. 823.

In *American Hospital & Life Insurance Co. v. Federal Trade Commission*, 243 F. 2d 719 (1957), the Court of Appeals for the 5th Circuit held that under the McCarran-Ferguson Act, the Federal Trade Commission was without jurisdiction to regulate insurance advertising in those states which have enacted laws for the regulation of false and deceptive advertising. The Federal Trade Commission has also applied for a writ of certiorari to review this decision, which has been granted.

The decisions of the Courts in the above cited cases are in complete accord with the statements made during the congressional debates on the McCarran-Ferguson Act.

> "Mr. McCarran: During the three year moratorium the States may, if they see fit to do so, enact legislation for the purpose of regulation. If they do enact such legislation, to the extent that they regulate, they will have taken the business of insurance in the respective states out from under

the Sherman Anti-Trust Act, the Clayton Act, and the other acts" (91 Cong. Rec. 1443).

* * * * * *

Mr. Ferguson: "After the moratorium has expired, if a State has not legislated on the subjects covered by the three acts to which reference has been made, those acts shall be applicable to the business of insurance. But insofar as the State is concerned, which has specifically legislated on the subject, the three acts shall not apply" (91 Cong. Rec. 1444).

* * * * * *

Mr. Ferguson: "There is no attempt here to have Congress throttled in the future acting upon insurance legislation. Subsection (b) of Section 2 provides that if Congress does act, the act shall specifically relate to the business of insurance.

"Mr. O'Mahoney: That is correct.

"Mr. Ferguson: What we have in mind is that the insurance business, being interstate commerce, if we merely enact a law relating to interstate commerce, or if there is a law in the books relating in some way to interstate commerce, it would not apply to insurance. We wanted to make sure that Congress would act specifically with reference to insurance in enacting the law.

"Mr. O'Mahoney: In other words, no existing law and no future law should, by mere implication, be applied to the business of insurance.

"Mr. Ferguson: That is correct" (91 Cong. Rec. 1487).

* * * * * * *

"Mr. Barkley: I am not uneasy about the situation. I do not believe that hereafter the Congress will not have full authority to deal with the subject if the States do not do so" (91 Cong. Rec. 1488).

In *Miley v. John Hancock Mutual Life Insurance Co., et al*, 48 F. Supp. 299 (1957), the United States District Court (Mass.) held that the Sherman Act was inapplicable to a claim involving the insurance business, in view of the fact that the State of Massachusetts had enacted a statute regulating all phases of the insurance business, under the authority granted by Congress in the McCarran-Ferguson Act. That decision was affirmed by the United States Court of Appeals for the First Circuit, 242 F. 2d 758, and on October 14, 1957 this Court denied an application for a writ of certiorari.

While it is true that the denial of a writ of certiorari by this Court does not necessarily carry with it approval of the decision sought to be reviewed, nevertheless, the effect of the denial of a writ in the *Miley* case is to leave the insurance laws of Massachusetts in full force and effect. On the other hand, the effect of the decision of this Court in the *New Orleans Insurance Exchange* case is to render the insurance laws of the State of Louisiana inoperative, where a violation of the Sherman Act involving the insurance business is alleged.

In the *New Orleans Insurance Exchange* case, the Government conceded, and the trial judge found

(148 F. Supp. 915, at page 920, Footnote 17) that "Louisiana has a comprehensive insurance code providing for the complete regulation of the insurance industry within the state. La. R.S. 22:1-22: 1734." The Louisiana Insurance Code includes criminal penalties up to two thousand dollars or imprisonment for one year or both. La. R.S. 22:1455. The more pertinent provisions of the Louisiana Insurance Code are provided for the court's convenience in Appendix "B" attached hereto.

These judicial interpretations coming after the passage of the McCarran Act are all unanimous and clear-cut affirmations that the Congress in the McCarran Act intended to and did in fact, consent to the regulation by the states of interstate insurance activities. The decision of the District Court in the instant *New Orleans Insurance Exchange* case is the only dissent.

The Government's position in this case rests upon a contention that Section 3 (b) of the McCarran-Ferguson Act *removes completely from state control* any "act of boycott, coercion, or intimidation". Section 3 of the McCarran Act is the so-called "mortorium" section whereby the Sherman Act and certain other Federal laws are suspended until June 30, 1948. This section reads as follows:

> "(a) Until June 30, 1948. . . the Sherman Act***the Clayton Act***the Federal Trade Commission Act***and the Robinson-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof. (b) Nothing contained in this act shall render the said Sherman Act inapplicable to any agree-

ment to boycott, coerce, or intimidate, or act of boycott, coercion or intimidation." 15 U.S.C. 1013.

The trial court has adopted an interpretation of Sub-Section 3 (b) which nullifies state control of the insurance business for all practical purposes. The Government has claimed in this case and can claim in almost any conceivable situation involving alleged violations of the Sherman Act in the business of insurance that boycott, coercion, or intimidation exist.

The Louisiana Insurance Code expressly covers "boycott, coercion and intimidation". La. R.S. 22: 1214 A. In addition, Louisiana law also includes a "Little Sherman Antitrust Act". This act is appended hereto as Appendix "C".

In an address by the Honorable Victor R. Hanson, Assistant Attorney General in charge of the Anti-Trust Division, Department of Justice, delivered before the National Association of Independent Insurers, in Chicago, Illinois, on Wednesday, October 16, 1957, the following alarming threat is made:

> "We are also concerned with acts of coercion, intimidation and boycott, wherever they may appear in the insurance field, including such conduct in the activity of rating bureaus and their associated bodies * * * Price fixing and other non-coercive restraints imposed by rating bureaus are subject to the Sherman Act to the extent that such business is not regulated by insurance. I do not believe that an exemption exists for these activities merely because a state has legislation, if it does not adequately enforce its regulations. . .".

This threat by the Department of Justice demonstrates that the regulation of the business of insurance

by the several states shall be subjected to the discretion of the Department of Justice in determining whether or not the states are "adequately" enforcing their state laws and regulations. Such a result was never intended by Congress in enacting the McCarran-Ferguson Act. The declaration of policy by the Congress in the preamble to that statute plainly showed that the regulation and taxation of the business of insurance can best be handled at state levels.

Congress could and did validly consent that the several states regulate insurance, whether interstate or intrastate. However, this grant was not unconditional, as the McCarran Act plainly says that Federal acts are ousted only to the extent of state regulation.

A clear expression of the concept that enactment of state law, of itself, accomplishes an ouster (to the extent of the enactment), is found in an exchange between Senator McCarran and Senator Murdock which occurred during the course of debate on Public Law 15.

> "Mr. McCarran: * * * Regulatory acts must be enacted by the several States in each of the several States. Otherwise the antitrust acts become effective after January 1, 1948 * * *
>
> "Mr. Murdock: And it is intended that on the expiration of the moratorium, the Sherman Act, the Clayton Act, and the other acts mentioned will again become effective except —
>
> "Mr. McCarran: Except as the States themselves have provided regulations * * *
>
> "Mr. Pepper: (Reading Section 2). Does that mean that after January 1, 1948, the States may

determine whether or not the Sherman and the other acts become applicable to the business of insurance?

"Mr. McCarran: The answer to that question is 'Yes'. During the 3-year moratorium the States may, if they see fit to do so, *enact legislation* for the purpose of regulation. If they *do enact such legislation*, to the extent that *they regulate they will have taken the business of insurance* in the respective States out from under the Sherman Anti-Trust Act, the Clayton Act, *and the other acts* * * * ". (Emphasis added) (91 Cong. Rec. 1471).

The Congress having placed the states in position to control and regulate the insurance business through the passage of state laws, did not contemplate nor authorize federal review of the conduct of the sovereign states in enforcing their laws. One sovereign cannot conceivably interpret its own laws on the basis of its judgment of the efficiency with which another sovereign enforces its laws. A state's sovereign power must include the authority to judge its own acts, as the states are supreme within their spheres. Under the McCarran Act their spheres include the power to regulate insurance.

The Congress having withdrawn the applicability of certain federal statutes to the extent that the insurance business is regulated by state law, each state has the right "to order its own affairs and govern its own people". 11 Am. Jur. 171 (1937). Under Public Law 15, a state has the same unlimited jurisdiction to make and enforce its own laws within its limits as another nation—except where that jurisdiction is

surrendered or restrained by the Federal Constitution. Here there is no such surrender or restraint.

South-Eastern Underwriters was a four to three decision. Mr. Justice Black delivered the opinion of the Court. Mr. Justice Roberts and Mr. Justice Reed took no part in the consideration of the case. Mr. Chief Justice Stone wrote an extensive and vigorous dissent in which he was joined by Mr. Justice Frankfurter and Mr. Justice Jackson wrote a separate convincing dissent. *If the issue was so substantial and so close a question in 1944 that the decision was four to three, and the Congress immediately enacted the McCarran-Ferguson Act to restore control of the insurance business to the states how can the issue be so unsubstantial in 1957. The scope and validity of the "exception" relating to "boycott, coercion and intimidation" have not been considered by this Court on the merits, and a proper understanding of the Court's position on this question is of critical importance throughout the nation.*

The decision of this Court in the *New Orleans Insurance Exchange* case may well again convulse the insurance industry. It is respectfully submitted that if this Court is again to permit such a result, at least the vital issues in this case should be briefed and argued on their merits. This Court has rendered no opinion whatever and has permitted the decision of the District Court to stand, without comment or elaboration. Even if this Court should hold the McCarran-Ferguson Act to be without effect as the District Court did, considerable clarification of the difficulties and problems confronting the insurance industry and the responsibilities of the respective state insurance

Commissioners could be obtained from an opinion of this Court, after considering this case on its merits.

CONCLUSION

The decree in this case was rendered on the Government's motion to affirm, without giving an opportunity to present briefs and arguments on the merits of the case. This action of the court was taken under Rule 16 (3) of the Revised Rules providing that:

> "The court will receive a motion to affirm the judgment sought to be reviewed on appeal from a Federal court on the *ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as* to not to need further argument."

Regardless of the other issues involved in this case, it is submitted that the single issue discussed in this brief is, in itself, so substantial as to fully justify and deserve the attention of this Court on the merits. Accordingly, this brief is filed in support of Appellant's petition for a rehearing.

Respectfully submitted,

JACK P. F. GREMILLION,
Attorney General of Louisiana

APPENDIX "A"

The McCarran-Ferguson Act

Title 15 U.S.C. Sections 1011-1015

"Sec. 1. Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Sec. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Sec. 3. (a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the

Robinson-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

Sec. 4. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

Sec. 5. As used in this Act, the term 'State' includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

Sec. 6. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected."

APPENDIX "B"

Louisiana Revised Statutes of 1950, Title 22, Section 1214 A as amended:

PART XXVI. UNFAIR TRADE PRACTICES

§ 1214. Methods, acts, and practices which are defined herein as unfair or deceptive

A. The following are declared to be unfair methods of competition and unfair or deceptive acts and practices in the business of insurance:

(1) Misrepresentations and false advertising of policy contracts. Making, issuing, or circulating, or causing to be made, issued, circulated, any estimate, illustration, circular or statement misrepresenting the term of any policy issued or to be issued or the benefits or advantages promised thereby, or the dividends or share of the surplus to be received thereon, or making any false or misleading statement as to the dividends or share of surplus previously paid on similar policies, or making any misleading representation or any misrepresentation as to the financial condition of any insurer, or as to the legal reserve system upon which any life insurer operates, or using any name or title of any policy or class of policies misrepresenting the true nature thereof, or making any misrepresentation to any policyholder insured in any insurer for the purpose of inducting or tending to induce such policyholder to lapse, forfeit, or surrender his insurance, or making any representation that the promised coverage is available to groups of persons when such persons do not fall within groups defined in this Code. In case of advertisements of policies providing health, accident, sickness or medical benefits where such policies are either cancellable or renewable at the option of the insurer, such adver-

tisements shall contain a statement to that effect in prominent type, and when details of benefits provided by a particular policy or plan of accident or health insurance are set forth in any advertising material, such advertising material shall disclose the major limitations of such policy or plan as well as the coverage advantage or benefits offered or promised.

(2) False information and advertising generally. Making, publishing, disseminating, circulating, or placing before the public, or causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio or television station; or in any other way, an advertisement, announcement or statement containing any assertion, representation or statement with respect to the business of insurance or with respect to any person in the conduct of his insurance business, which is untrue, deceptive or misleading.

(3) Defamation. Making, publishing, disseminating, or circulating, directly or indirectly, or aiding, abetting or encouraging the making, publishing, disseminating or circulating of any oral or written statement or any pamphlet, circular, article or literature which is false, or maliciously critical of or derogatory to the financial condition of an insurer, and which is calculated to injure any person engaged in the business of insurance.

(4) Boycott, coercion and intimidation. Entering into any agreement to commit or by any concerted action committing any act of boycott, coercion or intimidating resulting or tending to result in unreasonable

restraint of, or a monopoly in, the business of insurance.

(5) False financial statements. Filing with any supervisory or other public official, or making, publishing, disseminating, circulating or delivering to any person, or placing before the public, or causing directly or indirectly, to be made, published, disseminated, circulated, delivered to any person, or placed before the public, any false statement of financial condition of an insurer with intent to deceive.

Making any false entry in any book, report or statement of any insurer with intent to deceive any agent or examiner lawfully appointed to examine into its condition or into any of its affairs, or any public official to which such insurer is required by law to report, or which has authority by law to examine into its condition or into any of its affairs, or, with like intent, wilfully omitting to make a true entry of any material fact pertaining to the business of such insurer in any book, report or statement of such insurer.

(6) Stock operations and advisory board contract. Issuing or delivering or permitting agents, officers, or employees to issue or deliver, agency company stock or other capital stock, or benefit certificates or shares in any corporation, or securities or any special advisory board contracts or other contracts of any kind promising returns and profits as an inducement to insure.

(7) Unfair discrimination.

(a) Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract

of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract, provided that, in determining the class, consideration may be given to the nature of the risk, plan of insurance, the actual or expected expense of conducting the business or any other relevant factor.

(b) Making or permitting any unfair discrimination between individuals of the same class involving essentially the same hazards in the amount of premium, policy fees, or rates charged for any policy or contract of health or accident insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever, provided that, in determining the class, consideration may be given to the nature of the risk, plan of insurance, the actual or expected expense of conducting the business or any other relevant factor.

(c) Violating the provisions of R.S. 22:652.

(8) Rebates. Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any contract of insurance including life insurance, life annuity or health and accident insurance, or agreement as to such contract other than as plainly expressed in the contract issued thereon, or paying or allowing, or giving or offering to pay, allow, or give, directly or indirectly, as inducement to such insurance, or annuity, any rebate of premiums payable on the contract, or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the contract; or giving, or selling, or purchasing or offering to give, sell, or purchase as induce-

ment to such insurance or annuity or in connection therewith, any stock, bonds, or other securities of any insurer or other corporation, association, or partnership, or any dividends or profits secured thereon, or anything of value whatsoever not specified in the contract.

Nothing in paragraph (7) or this paragraph (8) of this Sub-section shall be construed as including within the definition of discrimination or rebates any of the following practices:

(a) Paying bonuses to policyholders or otherwise abating their premiums in whole or in part out of surplus accumulated from nonparticipating insurance, provided that any such bonuses or abatement of premiums shall be fair and equitable to policyholders and for the best interests of the insurer and its policyholders;

(b) In the case of life insurance policies issued on the industrial debit plan, making allowance to policyholders who have paid premiums in advance or continuously for a specified period made premium payment directly to an office of the insurer in an amount which fairly represents the saving in collection expense;

(c) Readjustment of the rate of premium for a group insurance policy based on the loss or expense experience thereunder, at the end of the first year or of any subsequent year of insurance thereunder, which may be made retroactive only for such policy year;

(d) Agents accepting on their own responsibility, notes for the first premiums.

(9) Requiring as a condition precedent to lending money upon the security of a mortgage upon real or

movable property, that the owner of the property to whom the money is to be loaned, negotiate any policy of insurance covering such real property through a particular insurance agent or broker or brokers, provided, however, that this provision shall not prevent the exercise by any insurer of its right to approve or disapprove the insurer selected by the borrower to underwrite the insurance.

(10) Issuing or causing to be issued at a premium rate less than the approved or customary rate any policy of insurance of any type or description upon life or property whenever such policy is to be furnished or delivered to the purchaser or pledgee or mortgagee of any property as an inducement to purchase or hypothecate said property, provided that nothing in this paragraph or in this act shall prohibit the issuance of creditor group life insurance, or creditor group health and accident insurance.

(11) Any violation of any prohibitory law of this state. As amended Acts 1954, No. 87, § 1; Acts 1956, No. 310, § 1.

Louisiana Revised Statutes of 1950, Title 22, Section 1455:

> "Violation of any provision of this Code, the punishment for which is not otherwise specifically stated herein, is declared to be a misdemeanor and is punishable by a fine of not less than ten dollars or more than two thousand dollars, or by imprisonment for not more than one year or both fine and imprisonment at the discretion of the court, in addition to any other provision for revocation, suspension or forfeiture of any license, power or privilege provided herein or otherwise provided by law."

APPENDIX "C"

Louisiana Constitution of 1921, Article 19, Section 14, as amended:

"It shall be unlawful for persons or corporations, or their legal representatives, to combine or conspire together, or to unite or pool their interests for the purpose of forcing up or down the price of any agricultural or manufactured product or article of necessity, for speculative purposes, and all combinations, trusts, or conspiracies in restraint of trade, commerce or business, as well as all monopolies or combinations to monopolize trade, commerce or business, are hereby prohibited in the State of Louisiana, and it shall be the duty of the Attorney General, of his own motion, or any District Attorney of the State, when so directed by the Governor or the Attorney General, to enforce this provision by the injunction or other legal proceedings, in the name of the State of Louisiana, and particularly, by suits for the forfeiture of the charters of offending corporations, incorporated under the laws of the State of Louisiana, and for the ouster from the State of foreign corporations. Provided, however, that nothing herein contained shall prevent the Legislature from provided additional remedies for the enforcement of this Section."

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 399

NEW ORLEANS INSURANCE EXCHANGE,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans Division.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

To the Honorables, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The New Orleans Insurance Exchange, Defendant and Appellant, through its undersigned counsel, presents this petition for a rehearing, in accordance with the provisions of Rule 58 of the Revised Rules of this Court, and, in support thereof, respectfully shows:

(1).

The complaint in this case charged the Defendant, New Orleans Insurance Exchange, with violating the provisions of Sections 1 and 2 of the Sherman Antitrust Act, and sought an injunction to restrain the alleged violations. The defendant is a private association composed of approximately 130 local insurance agents who handle fire, casualty, and surety business only in the three Louisiana Parishes of Orleans, Jefferson and St. Bernard. **The most important single issue in this case is whether the State of Louisiana has the right to regulate and control the business of insurance within its borders, or whether, on the contrary, this business is subject to Federal control and regulation, despite the provisions of the McCarran-Ferguson Act** (15 U.S.C.A., Secs. 1011-1015, see Appendix "A") **which was enacted by Congress for the express purpose of delegating to the states full power and authority to regulate and control the business of insurance.**

(2).

As will be hereinafter shown, this Court has recently considered several cases involving the meaning and effect of the McCarran-Ferguson Act, and has denied a writ of certiorari in one case; granted writs in two other cases; and, without a hearing, summarily affirmed the judgment of the district court in this case, all with results apparently conflicting and definitely confusing to the State insurance Commissioners and to the insurance industry throughout the nation. **If this question is not clearly answered by an interpretation of the McCarran-Ferguson Act, the parties affected will not know whether full compliance with the State laws may constitute direct violations of the Sherman Act and other Federal statutes.**

(3).

The decision by the district court in this case, granting an injunction in favor of the government, was rendered on February 5, 1957, and is reported at 148 F. Supp. 915.

(4).

A direct appeal to this Court was taken by the New Orleans Insurance Exchange, pursuant to 15 U.S.C. 29, which provides that in every civil action brought in any district court in the United States under the Sherman Antitrust Act, as amended, wherein the United States is complainant, an appeal from the final judgment of the district court will lie **only** to the Supreme Court.

(5).

In accordance with the provisions of Rule 15 of the Revised Rules of this Court, Appellant filed a jurisdictional statement, carefully following the requirements of that rule. Appellant refrained from presenting argument and authorities on the merits of the case, because Rule 15 neither requires nor permits argument and authorities on the merits.

(6).

Counsel for the Government then filed a Motion to Affirm, under Rule 16(1)(c), on the theory that, **"IT IS MANIFEST THAT THE QUESTIONS ON WHICH THE DECISION OF THE CAUSE DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT".** Included in the Motion to Affirm were authorities and argument on the merits of the case, not authorized by Rule 15.

(7).

In accordance with Rule 16(3) Appellant filed a brief in opposition to Appellee's Motion to Affirm. However, out of deference to the requirements of the Rules of this Court, counsel for Appellant limited the brief essentially to a showing that the questions on which the decision of this cause depends are most substantial, and are of vital public importance.

(8).

On October 28, 1957 this Court granted the Government's Motion to Affirm, and affirmed the judgment of the lower court, without ever having afforded Appellant an apportunity to present briefs or oral argument on the merits of the case. The time for filing a petition for rehearing was extended by Mr. Justice Black on November 6th, 1957, through December 6, 1957.

(9).

The decision in this case is of critical importance to the State of Louisiana, which has adopted a comprehensive insurance code, including severe penal provisions, for the purpose of regulating the business of insurance. The Attorney General of the State of Louisiana joined in Appellant's request for an extension of time within which to file a petition for a rehearing, for the reason that the Attorney General of the State of Louisiana needed additional time within which to prepare and file a brief, *amicus curiae*, in support of Appellant's petition.

(10).

The office of the Attorney General of the State of Louisiana has been in touch with representatives of a

number of public officials of other states who are vitally interested in the outcome of this case. These officials are considering the necessity of filing briefs, *amici curiae*, in support of Appellant's petition for a rehearing, and also in support of the position that Congress has expressly delegated to the several states the right to regulate and tax the business of insurance, with the result that the Sherman Act and certain other Federal laws are inapplicable to the business of insurance, to the extent that it has been regulated by the laws of the several states

(11).

The effect of the summary decision of this Court has been to **deprive Appellant of any appeal,** since the **only** appeal in a case of this kind is directly to the Supreme Court, and this Court has disposed of the entire matter on the Government's Motion to Affirm, without affording Appellant any opportunity to be heard, by either brief or oral argument on the merits.

(12).

The issues here involved are of widespread public importance, and the summary disposition of this case, without a hearing on the merits, has made it extremely difficult, if not impossible, for the representatives of the various states to prepare and file briefs *amici curiae;* whereas ample time would have been afforded if this Court had noted jurisdiction and permitted a hearing.

(13).

A condition of extreme disorganization and confusion in the regulation and taxation of the business of insurance by the various state insurance commissioners

will unquestionably result unless this Court recognizes and clarifies the effect of the McCarran-Ferguson Act which was enacted by Congress for the express purpose of recognizing and returning to the several states the right to control and tax the business of insurance. This legislation was made necessary by the precedent shattering 4 to 3 decision of this Court in *United States v. South-Eastern Underwriters Association*, 322 U. S. 533 (1944). As will appear from the authorities cited herein and in the annexed appendices, the *South-Eastern Underwriters* decision convulsed the insurance business. This Court had held for more than seventy-five years, starting with *Paul v. Virginia*, 8 Wall. (U. S.) 168, that the business of insurance did not fall within the contemplation of the Sherman Act, but was by Congress permitted to be exclusively subject to control and regulation by the several states. The recent actions of this Court in disposing of cases which involve the McCarran-Ferguson Act has resulted and is resulting in consternation in the insurance business and among the insurance commissioners of the several states.

(14).

In the first case to reach this Court after the enactment of the McCarran-Ferguson Act, Your Honors clearly stated that the purpose of Congress in enacting this legislation was to return to the states the power to regulate and tax the business of insurance. *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408 (1946). This conclusion was reaffirmed in *Wilburn Boat Company v. Firemen's Fund Insurance Company*, 348 U. S. 310 (1955); and has been uniformly followed by the circuit courts. *North Little Rock Transportation Co. v. Casualty Reciprocal Exchange*, 181 F. (2d) 174 (C.C.A. 8, 1950),

cert. den. 340 U. S. 823; *National Casualty Co. v. Federal Trade Commission*, 245 F. (2d) 883 (C. C. A.-6, 1957); *American Hospital & Life Insurance Co. v. Federal Trade Commission*, 243 F. (2d) 719 (C.C.A.-5, 1957); and *Miley v. John Hancock Mutual Life Insurance Company, et al.*, 242 F. (2d) 758 (C.C.A.-1, 1957), affirming 148 F. Supp. 299 (D. C., Mass., 1957).

In the *Miley* case, this Court, on October 14, 1957, **denied** an application for a writ of certiorari.

In the *National Casualty Company* and *American Hospital & Life Insurance Company* cases, this Court **granted** writs of certiorari on November 12, 1957.

In the case presently under consideration (New Orleans Insurance Exchange), this Court **affirmed, without a hearing,** the judgment of the district court.

(15).

It may be stated broadly that in the *Miley* case, the *National Casualty Company* case, and the *American Hospital & Life Insurance Company* case, the right of the several states to regulate the business of insurance was **upheld** by the Circuit Courts, whereas in the present case (New Orleans Insurance Exchange) the right of the State of Louisiana to regulate the business of insurance has been **denied.** The action of this Court in denying a writ in the *Miley* case, granting a writ in the other two cases, and affirming (without a hearing) the judgment of the district court in the New Orleans Insurance Exchange case results in conflict and confusion. Under these circumstances, it is submitted that the petition for a rehearing should be granted so that the New Orleans Insurance

Exchange will not be denied a hearing on appeal, and so that this Court may consider this case together with the *National Casualty Company* case and the *American Hospital & Life Insurance Company* case. Those two cases involve the Federal Trade Commission Act and the New Orleans Insurance Exchange case involves the Sherman Act. The entire question of the effect of the McCarran-Ferguson Act in delegating to the states the right to regulate the business of insurance can be clarified by this Court at one time, by granting the rehearing and docketing the three cases together.

(16).

The McCarran-Ferguson Act provides that, **"The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business".** 15 U.S.C. Section 1012(a). This statute further provides that, **"No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, UNLESS SUCH ACT SPECIFICALLY RELATES TO THE BUSINESS OF INSURANCE."** (All emphasis added unless otherwise indicated). The Act further provides that (after June 30, 1948) **the Sherman Act and the Federal Trade Commission Act shall be applicable to the business of insurance (only) to the extent that such business is not regulated by state law.** 15 U.S.C. Section 1012(b). In the present case the government conceded and the district court found (148 F. Supp. 915, at page 920, footnote 17) that **"Louisiana has a comprehensive insurance code providing for the complete regulation of the insurance industry within**

the State. L.R.S. 22:1-22:1734". This includes severe penal provisions (L.R.S. 22:1455) and expressly prohibits any act of boycott, coercion or intimidation resulting or tending to result in unreasonable restraint of, or a monopoly in, the business of insurance." L.R.S. 22:1214A.

(17)

The legislative history of the McCarran-Ferguson Act clearly shows that the whole purpose of the McCarran-Ferguson Act was to return to the several states the control, regulation and taxation of the business of insurance. Pertinent extracts from the debates in Congress are included in Appendix "B" (containing also an analysis of the McCarran-Ferguson Act, with copies of the bills from which it evolved).

For example:

> MR. REVERCOMB. Mr. President, I have listened with interest to the discussion concerning the amendment to paragraph (b) of section 2. **It occurs to me that not only does the proposed act provide for a suspension of the Clayton Act and the Sherman Act, but the very purpose of it is to restore the control of the insurance business to the States.** If we make the change proposed in this section and say "until January 1, 1948", then the bill in its completeness will end in 1948. The present provision is—and this was the measure reported unanimously by the Committee on the Judiciary - - -
>
> "No act of Congress" - - -
>
> Existing at this time, or passed before this, or to be passed in the future - - - "shall be construed to invalidate, impair, or supersede any law enacted by any State * * * unless such act specifically so provides."

I do not think there should be any limitation of time in the provision. We do not want the law to end on January 1, 1948. **We want the business left in the control of the States, unless by enactment in the future we specifically state that we do not want something they are doing to be continued.** 91 Cong. Rec. 485 (1945).

* * * * * *

MR. ELLENDER. Mr. President, as I understand **the pending measure it has two main purposes: First, a declaration of policy by the Congress that the continued regulation and taxation by the several States of the business of insurance is in the public interest and that the States shall continue to regulate and tax it, unless Congress specifically legislates on the subject matter to the contrary.** Second. A moratorium is declared making ineffective the Sherman and Clayton Acts for a time specified in section 4(a) of the bill so that States can adjust their laws on the subject. The Judiciary Committee made a careful study of the problems involved and has reported the bill and I believe that the bill as it came from the committee is not ambiguous, but carries out the purposes above set forth by me.

* * * * * *

MR. FERGUSON. I take it the language now used would be very confusing. The bill excludes all acts except those enumerated. We will have to change the language so as to make all other acts not applicable except the Sherman Act and the Clayton Act. Then we except those acts in the next section.

MR. ELLENDER. Such language put in proper place would cover the objection I suggested to the pending amendment. However, I am not ad-

vocating it, because I think the bill as reported by the Judiciary Committee is clear. **I think all of us agree that the States should retain the right of regulating and taxing the insurance business within their respective borders.**

* * * * * * *

MR. WHERRY. * * * **As a member of the Committee on the Judiciary, I am for the bill as it came from the committee. The reason I voted for it was that it would put the regulation of the insurance business in the hands of the States. That is the important thing in this bill.** I believe that the amendments which have been suggested would be confusing and conflicting. In my judgment the bill would be better if it were left as it was reported from the committee than if we were to try to amend it on the floor of the Senate. I hope the amendments will be rejected. 91 Cong. Rec. 487 (1945).

* * * * * * *

MR. PEPPER. **Does that mean that after January 1, 1948, the States may determine whether or not the Sherman and the other acts become applicable to the business of insurance?**

MR. MC CARRAN. **The answer to that question is "Yes". During the 3-year moratorium the States may, if they see fit to do so, enact legislation for the purpose of regulation. If they do enact such legislation, to the extent that they regulate they will have taken the business of insurance in the respective States out from under the Sherman Anti-Trust Act, the Clayton Act, and the other acts. If during the moratorium the States do not enact legislation for regulatory purposes, then on January 1, 1948, the Sherman Act, the Clayton Act, and the other acts will become immediately applicable.**

MR. WHITE. Mr. President, **is it not perfectly clear that the force and effect of these Federal statutes may be applicable and shall be applicable to whatever extent the State law fails to occupy the ground and engage in regulation?** As I take it, there are two jurisdictions.

MR. MC CARRAN. There always are.

MR. WHITE. **There is the State, authorized to act to whatever extent seems proper.**

MR. MC CARRAN. That is correct.

MR. WHITE. Then the Federal Government can come in, and it does come in and may legislate beyond the limit of the State legislation.

MR. MC CARRAN. **To the extent that the States does not regulate.**

MR. WHITE. **To the extent that the State does not regulate.**

91 Cong. Rec. 1443-1444 (1945). (Emphasis added).

(18).

The district court has held that the business of insurance in Louisiana is subject to the provisions of the Sherman Act, despite the fact that the Sherman Act does not "specifically relate to the business of insurance", and despite the fact that the State of Louisiana has adopted a comprehensive insurance code completely regulating the business of insurance.

(19).

The holding of the district court is based upon an abortive exception appearing in the McCarran Act as follows:

> "Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." 15 U.S.C. Section 1013(b).

The district judge evidently believed that there are certain provisions of the Sherman Act which prohibit "boycott, coercion, or intimidation"; and in support of this erroneous conclusion, he cited an extract from the Senate Judiciary Report on the bill expressing the opinion that this section "provides that at no time are the **prohibitions in the Sherman Act against any act of boycott, coercion, or intimidation suspended. THESE PROVISIONS OF THE SHERMAN ACT REMAIN IN FULL FORCE AND EFFECT".** (Emphasis added). 148 F. Supp. 915 at 922, footnote 23.

(20).

As a matter of fact, **the Sherman Act contains no prohibition whatever** against "boycott, coercion, or intimidation", as such, and these words do not appear in the statute at all. **It is only to the extent that such acts might constitute a restraint of trade or a monopoly, or an attempt to restrain trade or to effect a monopoly, that such acts could constitute a violation of the Sherman Act.** However, the McCarran-Ferguson Act clearly provides that where the state has regulated the business of insurance, as Louisiana has, the Sherman Act shall have no application.

(21).

If the district judge is correct in his interpretation of the McCarran-Ferguson Act, the Defendant and its members would be subject to **criminal prosecution** un-

der the provisions of the Sherman Act. Criminal and penal statutes must be strictly construed. They cannot be enlarged or extended by intendment or implication, and only those persons, offenses and penalties clearly included beyond any doubt should be considered within the operation of the statute. They must come clearly within both the spirit and the letter of the statute, and where there is any reasonable doubt it must be resolved in favor of the party accused of violating the statute. *Crawford, Statutory Construction*, Section 240, page 640. The rule that penal statutes are strictly construed establishes a requirement of definiteness which must be met by legislative draftsmen. **Thus it is not uncommon to find penal statutes declared void for indefiniteness. The words of the criminal statute must be such as to leave no reasonable doubt as to the intention of the legislature and where such doubt exists the liberty of the citizen is favored.** *Sutherland, Statutory Construction*, (3rd Ed.) Vol. 3, Sec. 5605, p. 54. It is well settled that the courts will not construe one portion of a statute to annul that which has been clearly granted in another section. *Peck v. Jenness*, 42 U. S. 612; *Iglehart v. Iglehart*, 204 U. S. 478; see also, *U. S. v. Katz*, 271 U. S. 384. In *Federal Communications Commission v. American Broadcasting Company*, 346 U. S. 284, injunction proceedings were brought to enjoin the Federal Communications Commission from enforcing certain provisions of the rules promulgated by it under 18 U.S.C., Section 1304. The issue was whether the provisions of the rules correctly interpreted Section 1304. This statute prohibits the broadcasting of "any lottery, gift enterprise, or similar scheme * * *", under penalty of fine or imprisonment. The Commission argued that Section 1304 should be broadly construed to include within

its provisions the type of program banned in its rules. However, this Court pointed out that **although criminal proceedings were not involved in that case, nevertheless the court was called upon to interpret a criminal statute; hence, a strict construction was required.**

(22).

Assuming, but denying, that the Sherman Act is applicable to the present case, there is no violation where the restraint of interstate commerce, if any, is not unreasonable and is not substantial. *Hopkins, et al., v. United States,* 171 U. S. 578; *Anderson, et al., v. United States,* 171 U. S. 604; *Hooper v. California,* 155 U. S. 648; *Mandeville Farms v. American Crystal Sugar Co.,* 334 U. S. 219; see also, *United States v. Frankfort Distilleries, Inc.,* 324 U. S. 293; and *United States v. Women's Sports Wear Mfg. Assn.,* 336 U. S. 460, 462.

(23).

In all of the appellate court decisions involving trade associations having rules, regulations, and practices virtually identical to those under consideration in this case, **the courts have uniformly held that such rules are reasonable regulations for the protection of the members of such associations and of the public, and are not illegal.** *Cline v. Insurance Exchange of Houston,* 151 S. W. (2d) 491 (1941) and (in the Supreme Court of Texas) 140 Tex. 175, 166 S. W. (2d) 677; *Bersch v. The Fire Underwriters Assn. of St. Louis,* 241 S. W. 428; *Louisville Board of Fire Underwriters v. Johnson,* 133 Ky. 797, 119 S. W. 153; *Booker & Kainnaird v. Louisville Board of Fire Underwriters,* 188 Ky. 771, 224 S. W. 451 (cited with approval by the Second Circuit Court of Appeals in *Edelstein v. Gil-*

more, 35 F. (2d) 726); *Cox v. Gov. Ins. Co.*, 126 F. (2d) 254 (in which the United States Court of Appeals for the Sixth Circuit expressly approved the Kentucky cases referred to above); and *Miller v. Minneapolis Underwriters Association, et al.*, 226 Minn. 367, 33 N. W. (2d) 48.

(24).

In the following cases, involving boycotts or concerted refusals to deal, this Court applied the Rule of Reason and found the "boycott" to be legal: *Associated Press v. United States*, 326 U. S. 1; *Anderson v. United States*, 171 U. S. 604; *Hopkins v. United States*, 171 U. S. 578; *United States v. American Livestock Commission Company*, 279 U. S. 537; *United States v. Oregon State Medical Society*, 343 U. S. 326 (affirming 95 F. Supp. 103).

(25).

If the district judge is correct in his interpretation of the McCarran-Ferguson Act, and if the Sherman Act is applicable in any case of "boycott, coercion or intimidation" (despite comprehensive regulation of the insurance business by the State of Louisiana), **the general provisions of the Act are rendered virtually nugatory.** This is true for the reason that the Department of Justice and the courts can take the position that the actions of the parties in almost any conceivable case constitute "boycott, coercion, or intimidation", in one form or another.

(26).

The complaint in this case alleged that insurance companies have been unable to operate freely in Louisiana, as a result of the activities of the Defendant; but the

record is devoid of any testimony or evidence showing, or attempting to show, any adverse effect on any insurance company. Likewise, the complaint alleges that some insurance **agents** in the New Orleans area have been unable to obtain adequate company representation. However, **the record is devoid of proof in support of this charge,** except that the testimony showed that all agents in the New Orleans area, both within and without the Exchange, experience some difficulty in placing Workmen's Compensation insurance and surety business. The trial court found that a very substantial part of the fire, casualty, and surety business in the New Orleans area is handled by members of the New Orleans Insurance Exchange, who represent only stock insurance companies. However, the record shows that **a similar proportion of all such business is handled by stock insurance agents throughout the nation.**

(27).

The record is also devoid of any proof that the activities of the New Orleans Insurance Exchange and its members have affected the **cost of insurance** to the public or the **availability of completely adequate insurance coverage.** The principal objection by the Department of Justice to the activities of the New Orleans Insurance Exchange is that the members of the Exchange have agreed to support the American Agency System and have agreed to represent only **stock** insurance companies writing fire, casualty and surety business. The record shows that insurance agents cannot properly handle a "mixed" agency, representing both stock companies and mutual companies, because of the conflicts of interest which immediately arise.

(28).

There are several additional important questions presented by this appeal, as set forth in Appellant's Jurisdictional Statement (pages 4-7). Appellant does not abandon any of the issues which are included in the Statement of Jurisdiction and reserves all rights in connection therewith. This petition for a rehearing has been limited to the development of several of the most important issues, each of which fully justifies the granting of a rehearing.

CONCLUSION.

It is submitted that a rehearing should be granted in this case for the following reasons:

(1) The issues are of widespread public importance, affecting state insurance commissioners and the insurance industry throughout the United States.

(2) The only appeal permitted in this case was from the District Court directly to this Court. Your Honors granted the Government's motion to affirm, without affording Appellant an opportunity to submit briefs or oral argument on the merits, with the result that Appellant has been deprived of any hearing on appeal.

(3) The Attorney General for the State of Louisiana joined in Appellant's motion to extend the time for filing this petition for a rehearing, in order to obtain sufficient time to file a brief *amicus curiae*. If this Court had noted jurisdiction, instead of affirming the judgment of the District Court without a hearing, ample opportunity would have been afforded the Attorneys General of other states to file briefs *amici curiae*.

(4) Several cases recently considered by this Court involve the effect of the McCarran-Ferguson Act. In one case a writ of certiorari was denied and in two cases writs were granted. Those three cases involve the Federal Trade Commission Act and the present case involves the Sherman Act. All four of these cases involve an interpretation of the McCarran-Ferguson Act, which was enacted by Congress for the express purpose of permitting the several states to regulate and tax the business of insurance. Accordingly, this case should be considered with the two cases in which writs have been granted, so that this Court can give the various insurance commissioners and the insurance industry a workable expression of the Court's interpretation of the effect of the McCarran Act. As the situation now stands, the insurance industry and the insurance commissioners are operating in an area of complete uncertainty as to whether full compliance with state laws regulating the business of insurance may constitute violations of the Sherman Act, the Federal Trade Commission Act, and other Federal statutes.

(5) The exception appearing in Section 3(b) of the McCarran-Ferguson Act, relating to "boycott, coercion and intimidation" cannot create in the Sherman Act a prohibition which does not exist in that statute.

(6) If the Sherman Act is applicable, which is denied, the defendant has, nevertheless, not been guilty of any violation of the Sherman Act, because the by-laws and activities of the New Orleans Insurance Exchange are necessary and proper and are protected by the Rule of Reason which has frequently been applied by this Court.

Accordingly, a rehearing should be granted and jurisdiction should be noted, affording Appellant and the Attorneys General of Louisiana and other states an opportunity to present this case on the merits.

Respectfully submitted,

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CERTIFICATE.

I, MURRAY F. CLEVELAND, one of the attorneys for the New Orleans Insurance Exchange, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay; and that on the day of December, 1957, I served copies of the foregoing petition for a rehearing on the United States of America by (a) depositing a copy thereof in a United States mailbox, with airmail postage prepaid, addressed to the Honorable J. Lee Rankin, Solicitor General of the United States, Washington 25, D. C., (b) depositing a copy thereof in a United States mailbox, with airmail postage prepaid, addressed to the Honorable Victor R. Hansen, Assistant Attorney General of the United States, Washington 25, D. C., and (c) depositing a copy thereof in a United States mailbox, with first class postage prepaid, addressed to the Honorable M. Hepburn Many, United States Attorney for the Eastern District of Louisiana, Federal Building, New Orleans, Louisiana.

MURRAY F. CLEVELAND,
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APPENDIX "A"

THE McCARRAN-FERGUSON ACT
TITLE 15 U. S. C. A. SECTIONS 1011-1015

Section 1011. **Declaration of policy**

Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States. Mar. 9, 1945, c. 20, Section 1, 59 Stat. 33.

Section 1012. **Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948**

a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance; Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amend-

ed, shall be applicable to the business of insurance to the extent that such business is not regulated by State law. Mar. 9, 1945, c. 20, Section 2, 59 Stat. 34; July 25, 1947, c. 326, 61 Stat. 448.

Section 1013. **Suspension until June 30, 1948, of application of certain Federal laws; Sherman Anti-Trust Act, applicable to agreements to, or acts of, boycott, coercion, or intimidation**

a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Anti-discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

b) Nothing contained in this chapter (as enacted, the word "chapter" was "act") shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation. Mar. 9, 1945, c. 20, Section 3, 59 Stat. 34; July 25, 1947, c. 326, 61 Stat. 448.

Section 1014. **Applicability of National Labor Relations Act and the Fair Labor Standards Act of 1938**

Nothing contained in this chapter shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the

Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920. Mar. 9, 1945, c. 20, Section 4, 59 Stat. 34.

Section 1015. **Definition of "State"**

As used in this chapter, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia. Mar. 9, 1945, c. 20, Section 5, 59 Stat. 34.

APPENDIX "B"

ANALYSIS AND LEGISLATIVE HISTORY OF THE McCARRAN-FERGUSON ACT

A careful examination of the language of the McCarran-Ferguson Act will disclose that Congress said clearly and unequivocally, in at least three different ways, that it intended to, and did, authorize the various States to regulate the business of insurance and every person engaged therein, and that the three-line subsection which is the basis of the trial court's decision does **not** nullify the four paragraph grant of Congress in the first three sections of the Act.

In Section 1 Congress said:

> "CONGRESS HEREBY DECLARES THAT THE CONTINUED REGULATION AND TAXATION BY THE SEVERAL STATES OF THE BUSINESS OF INSURANCE IS IN THE PUBLIC INTEREST, AND THAT SILENCE ON THE PART OF THE CONGRESS SHALL NOT BE CONSTRUED TO IMPOSE ANY BARRIER TO THE REGULATION OR TAXATION OF SUCH BUSINESS BY THE SEVERAL STATES." (All emphasis in this appendix is added).

It will be remembered that the McCarran-Ferguson Act followed the decision of the United States Supreme Court in the *Southeastern Underwriters* case (322 U. S. 533), which upset seventy-five years of jurisprudence by holding that insurance can be commerce within the meaning of the commerce clause of the United States Constitution, so as to be subject to Federal regulation and control. Congress specifically and unequivocally declares its policy

in Section 1, saying that **it is in the public interest that the business of insurance be regulated BY THE SEVERAL STATES.**

Section 2(a) could not be clearer and more unequivocal in stating that:

> "THE BUSINESS OF INSURANCE, AND EVERY PERSON ENGAGED THEREIN, SHALL BE SUBJECT TO THE LAWS OF THE SEVERAL STATES WHICH RELATE TO THE REGULATION OF TAXATION OF SUCH BUSINESS."

It is to be noted that Congress here says that not only the "business of insurance", but also **"every person engaged therein" shall be regulated by the laws of the several States.**

Section 2(b) provides that:

> "NO ACT OF CONGRESS SHALL BE CONSTRUED TO INVALIDATE, IMPAIR, OR SUPERSEDE ANY LAW ENACTED BY ANY STATE FOR THE PURPOSE OF REGULATING THE BUSINESS OF INSURANCE, OR WHICH IMPOSES A FEE OR TAX UPON SUCH BUSINESS, UNLESS SUCH ACT SPECIFICALLY RELATES TO THE BUSINESS OF INSURANCE: Provided that after June 30, 1948 * * * the **Sherman Act,** * * * the Clayton Act, * * * and the * * * Federal Trade Commission Act, as amended, shall be applicable to the business of insurance **TO THE EXTENT THAT SUCH BUSINESS IS NOT REGULATED BY STATE LAW."**

With reference to the first portion of this subsection, it is to be noted that Congress again says unequivocally that **no** Act of Congress shall invalidate, impair, or

supersede any State law regulating the business of insurance **unless such Act of Congress specifically relates to the business of insurance.** The Sherman Act is an Act of Congress and **it does not relate specifically to the business of insurance.** It would seem clear, therefore, that the State law would control. Louisiana has adopted an extremely comprehensive insurance code which completely regulates the business of insurance, including specifically the prohibition of illegal restraints and monopoly through boycott, coercion and intimidation. Severe penalties in the form of fine and imprisonment are provided. Yet the trial court has held that the Sherman Act supersedes and nullifies the Louisiana Insurance Code, and that Federal control over the insurance business in Louisiana continues, despite the sweeping provisions of the McCarran-Ferguson Act.

It will be observed that the second portion of Section 2(b) states that **after** June 30, 1948 (in other words when the moratorium provided by Section 3(a) expired), the Sherman Act, the Clayton Act and the Federal Trade Commission Act shall be applicable to the business of insurance **TO THE EXTENT THAT SUCH BUSINESS IS NOT REGULATED BY STATE LAW.**

In Section 3(a) Congress then provided the "moratorium" feature of the law, stating that until June 30, 1948 (as extended) the Sherman Act, the Clayton Act, the Federal Trade Commission Act, and the Robinson-Patman Act **shall not apply to the business of insurance or to acts in the conduct thereof.** This delay was designed to give each State ample opportunity (approximately three years) to enact laws regulating the business of insurance. Congress did not permanently abandon all control over

the business of insurance, but did expressly provide that after the moratorium the designated Federal Anti-Trust statutes would again become effective, **if, and only to the extent that, the respective State legislatures should fail to act in regulating the business of insurance.**

It is difficult to imagine how Congress could have been more explicit and more comprehensive in stating its policy and intention and in granting to the several States the full and complete right to regulate the business of insurance. It is to be noted particularly that even activities which might involve **combinations in restraint of trade, monopolies, and price fixing** in the business of insurance were clearly made the subject of **local** control. As pointed out above, Congress recognized that the public interest can best be served by regulating the insurance business at a local level; and this action on the part of Congress simply restored the status which had existed for seventy-five years before the *Southeastern Underwriters* case.

Then follows the three line subsection which according to the holding of the trial court undid and nullified all that Congress so comprehensively and explicitly did in the preceding four paragraphs. Subsection 3(b) reads as follows:

> "Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

It will be seen that this special subsection purports to provide an exception of some kind to the sweeping general provisions of the Act. If this subsection does what the trial court believes it did, it is in hopeless conflict

with the delegation to the States of the right to regulate the business of insurance on a local level, insofar as the present case is concerned.

The legislative history of this Act discloses that the provision which is now subsection 3(b) originally read as follows:

> "Nothing contained in this **SECTION** shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

Such language **would obviously have restricted the exception to the moratorium section of the statute.** In other words, the original bill provided that the States had a right to regulate the business of insurance; that the State legislatures were given approximately three years within which to do so; and that **during the moratorium and until the States acted,** the Sherman Act would remain applicable to acts and agreements of boycott, coercion and intimidation (assuming that it was "applicable" to such acts and agreements).

Both the Senate and the House originally passed separate bills both of which contain a provision in the moratorium section saying:

> "Nothing contained in this **SECTION** shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

Attached hereto (and printed herein) as **Exhibit 1** and **Exhibit 2,** are certified copies of Senate Bill 340 as it was originally introduced by Senator McCarran on January 18, 1945; and as reported by the Senate Com-

mittee on the Judiciary on January 24, 1945, together with **Exhibit 3,** consisting of a certified copy of Senate Report No. 20, dated January 24, 1945, to accompany S. 340.

Also attached hereto, as **Exhibit 4,** is a certified copy of the House version of S. 340, showing that after being passed by the Senate on January 25, 1945, this bill was referred to the House Committee on the Judiciary on January 29, 1945.

Attached as **Exhibit 5, Exhibit 6** and **Exhibit 7,** are certified copies of a) H.R. 1973, as introduced in the House of Representatives by Rep. Walter on February 2, 1945; b) as reported by the Hou Committee on the Judiciary on February 8, 1945, together with c) House Report 68 to accompany H.R. 1973.

It will be found that in every single one of the above documents the subsection now under consideration read:

> "Nothing contained in this (the moratorium) **SECTION** shall render the Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

An examination of House Report 68 **(Exhibit 7)** is most enlightening, particularly because of its Analysis of the Act by Section, reading as follows:

> "Section 1 declares that the continued regulation and taxation by the States of the business of insurance is in the public interest.
>
> Section 2 provides that the insurance business, and all persons engaged in such business,

shall be subject to State laws relating to the regulation and taxation of such business; and (b) that no act of Congress shall be construed to invalidate, impair, or supersede any State law which regulates or taxes the insurance business, unless such act specifically so provides.

Section 3 provides that the Federal Trade Commission Act and the Robinson-Patman Antidiscrimination Act shall not apply to the insurance business, or to acts in the conduct of such business.

Section 4 suspends the application of the Sherman Act and the Clayton Act to the business of insurance until January 1, 1948, for the purpose of enabling adjustments to be made and legislation to be adopted by the several States and Congress; and (b) provides that at no time are the prohibitions in the Sherman Act against any act of boycott, coercion or intimidation suspended. These provisions of the Sherman Act remain in full force and effect.

Section 5 provides that the enactment of this act shall not affect, in any manner, the present application of the National Labor Relations Act, the Fair Labor Standards Act, or the Merchant Marine Act, to the business of insurance.

Section 6 defines the term 'State'.

Section 7 provides for separability of provisions."

It will be noted that, according to the above analysis and to the bill then under consideration, the Sherman Act was to remain in full force and effect **during the moratorium** as to acts of boycott, coercion and intimidation; but regulation **after the moratorium** would be determined by the extent to which the States exercised, or

failed to exercise, the authority granted by Congress by enacting or failing to enact legislation regulating the business of insurance.

Our own analysis of the legislative history of the Act is interrupted at this point to emphasize certain extraordinary language of H.R. 68, quoted above. This report states that Subsection (b) of the moratorium section of the Act **"provides that at no time are THE PROHIBITIONS IN THE SHERMAN ACT AGAINST ANY ACT OF BOYCOTT, COERCION OR INTIMIDATION SUSPENDED. THESE PROVISIONS OF THE SHERMAN ACT REMAIN IN FULL FORCE AND EFFECT."**

Language of this kind evidently helped to establish and perpetuate a basic defect in the exception relied on by the trial court, and the exception became progressively more defective and more emasculated as the bill was processed through Congress, until it reached its present wholly conflicting and completely irreconcilable status. It will be observed that the above quoted report expressed the clearly erroneous view that the **Sherman Act contains** "prohibitions against any act of boycott, coercion or intimidation", and that **"these provisions of the Sherman Act remain in full force and effect."** We have examined and re-examined the Sherman Act, and we find that **it does not contain a single line or word providing that acts or agreements of boycott, coercion or intimidation are illegal!**

It was in this connection that, in the trial court, we urged so strenuously on motion to dismiss that the exception contained in what is now subsection 3(b) of the McCarran-Ferguson Act cannot possibly breathe life

into the Sherman Act in such a way as to create and establish a criminal act which is not provided by the Sherman Act itself! Some members of Congress clearly were of the erroneous impression that the Sherman Act contained provisions prohibiting acts and agreements of boycott, coercion and intimidation. But if Congress says that **nothing in the McCarran-Ferguson Act** "shall render the Sherman Act inapplicable to any agreement or act of boycott, intimidation or coercion", **does this declaration automatically make the Sherman Act "applicable" to any agreement or act of boycott, intimidation or coercion?** Obviously, a provision of this kind does not and cannot create a statutory crime by indirection; and yet this contention is the basis upon which the position of the trial court depends in the present case!

Returning to the legislative development of the McCarran-Ferguson Act, we attach hereto as **Exhibit 8,** S. 340 as reported by the House on February 13, 1945, and **Exhibit 9,** consisting of House Report 143, dated February 13, 1945. An examination of these two Exhibits will disclose that the House Committee on the Judiciary **struck out all of the provisions of S. 340 with the exception of the enacting clause,** and then proceeded to insert its own version of this law. However, the moratorium subsection continued to read as follows:

> "Nothing in this **SECTION** shall render the said Sherman Act inapplicable to any act of boycott, coercion, or intimidation."

Hence, all comments contained in H.R. 143 are referring to a bill in which the exception now under consideration was clearly and expressly **limited to the period of the moratorium.**

The "Analysis by Section" phase of House Report 143 contains virtually the identical statements as are contained in House Report 68, quoted above. It is important to note that this report also contains the **previous statement of the erroneous assumption or impression that the Sherman Act prohibits acts of boycott, coercion and intimidation,** and that **"these provisions of the Sherman Act remain in full force and effect".**

Attached hereto as **Exhibit 10** is a certified copy of the Conference Report (House Report 213) dated February 22, 1945, in which the House and Senate Committees agreed upon the final language of the McCarran-Ferguson Act. This is the first draft of the statute in which the language of the exception now under consideration was changed to read:

> "Nothing contained in this **ACT** shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

The conference report made absolutely no comment upon this change, which, if the trial court is correct, completely altered the meaning and duration of the exception, and by the mere stroke of a pen by some member of the conference committee changing a single word from "Section" to "Act", emasculated and nullified the delegation to the States of the regulatory powers contemplated by all prior versions of the statute!!

With this legislative background it is impossible to reconcile this abortive exception with the clear and sweeping general provisions of the Act. As pointed out above, the assumption or impression by some members of

Congress that the Sherman Act contains provisions prohibiting acts or agreements of boycott, coercion or intimidation is completely erroneous; and this misconception is undoubtedly responsible for the strange exception which the emasculation of the original bill finally produced.

Some of the pertinent statements made in the course of the debates, showing the clear intention of Congress to permit the states to regulate the business of insurance, and also disclosing the state of confusion which surrounded the consideration of the exceptions to the general provisions of the statute are as follows (emphasis added):

> Proceedings and Debates of the 79th Congress, First Session Vol. 91, Part 1, January 30, 1945 to February 23, 1945.

SENATE

Page 485:

> MR. TAFT. I think there is an ambiguity in the bill. Assume that no more legislation were enacted and ir 1948 a case should arise involving the question. Does the Sherman Act invalidate any State law under this bill? In Section 4(a) of the bill it is implied that in 1948 the Sherman Act shall again come into force unless something has been done in the meantime. However, in section 2(b) it is implied that even in 1948 the Sherman Act shall not invalidate any State regulatory law. I think that in that respect the bill is ambiguous on its face. We should straighten out the difference between the two sections.
>
> MR. RADCLIFFE. I would assume that at the end of the period of moratorium the Clayton Act and the Sherman Act would apply.

MR. TAFT. Paragraph (b) of section 2 of the bill states that "No act of congress shall ever presume to invalidate a State law on the subject of insurance."

MR. FERGUSON. I suggest that we could remedy the defect by making the subsection read: "Until January 1, 1948, no act of Congress", and so forth.

THE VICE PRESIDENT. Does the Senator from Michigan offer that as an amendment to the amendment offered by the Senator from Utah (Mr. Murdock)?

MR. FERGUSON. I offer it as an amendment to the amendment.

Page 485:

MR. REVERCOMB. Mr. President, I have listened with interest to the discussion concerning the amendment to paragraph (b) of section 2. **It occurs to me that not only does the proposed act provide for a suspension of the Clayton Act and the Sherman Act, but the very purpose of it is to restore the control of the insurance business to the States.** If we make the change proposed in this section and say "until January 1, 1948", then the bill in its completeness will end in 1948. The present provision is - - - and this was the measure reported unanimously by the Committee on the Judiciary - - -

"No act of Congress" - - -

Existing at this time, or passed before this, or to be passed in the future - - -

"shall be construed to invalidate, impair, or supersede any law enacted by any State * * *, unless such act specifically so provides."

I do not think there should be any limitation of time in the provision. We do not want the law to end on January 1, 1948. **We want the business left in the control of the States, unless by enactment in the future we specifically state that we do not want something they are doing to be continued.**

MR. TAFT. The Senator's suggestion might be pertinent if it were not absolutely contradicted by section 4, which provides that on June 1, 1947, the Sherman Act shall again apply to the business of insurance. If we leave that provision in the bill, the one now being discussed is inconsistent with it, because if the Sherman Act applied to the business of insurance, any State law which authorizes a rating bureau becomes invalid, or those engaged in the business are subject to Federal prosecution for complying with the State law.

MR. REVERCOMB. The only two Federal laws mentioned are the Clayton Act and the Sherman Act, and the purpose of mentioning those specifically is to require the States to enact legislation as not to violate those two existing laws. If any legislation is enacted in the future, whatever it may be—I cannot contemplate it today—if any law shall be enacted by the Congress on interstate commerce which could possibly affect the business of insurance and bring it within the general term "interstate commerce," it would apply. **Why not let the provision stand that it shall not apply unless Congress specifically says in an act that it shall apply to the business of insurance, which we are now trying to return to the States?**

Page 486:

MR. REVERCOMB. As I see it, two things are proposed by this bill. Not only a moratorium with respect to the Sherman Act and the Clayton Act—and we all agree that that is its purpose—

but it goes further than that, if I may say so to the able Senator, and carries out the purpose of giving power to the States of regulation of insurance and the taxing of insurance companies, so long as they do not get into conflict with a Federal law. The section before us provides that no act of Congress shall be construed to invalidate a State law unless the act of Congress specifically states that the State law is in conflict with the Federal act and is designed to override it.

MR. MURDOCK. Will the Senator yield further?

MR. REVERCOMB. I yield.

MR. MURDOCK. Then it is applicable, it does apply, does it not, to the Sherman Act, and also to the Clayton Act, presently, because neither one of those acts specifically repeals or impairs or invalidates any State law?

MR. REVERCOMB. I do not agree with that conclusion, because section 4 of the bill specifically says that the Clayton Act and the Sherman Act shall again be in force on the dates mentioned.

MR. MURDOCK. That is what the Senator from Ohio called to the Senator's attention, that there is an inconsistency in the two sections, which is clarified by the amendment offered by the Senator from Michigan.

MR. REVERCOMB. I do not think there is an inconsistency when they are read together. One says that no act of Congress shall be construed to invalidate unless Congress specifically says that it shall invalidate. Section 4 provides specifically with respect to the Sherman Act and the Clayton Act. Subsection (b) of section 2 would apply to all other laws. Section 4(a) applies to the Sherman Act and the Clayton Act. I think the sections

can be read together. But I wish to say to the Senator from Michigan that if he inserts the language "until January 1, 1948," as the time to which that section shall be in effect, he automatically terminates it at that time, and automatically terminates the control of the States over insurance.

Page 487:

MR. ELLENDER: Mr. President, as I understand the pending measure it has two main purposes: First, a declaration of policy by the Congress that the continued regulation and taxation by the several States of the business of insurance is in the public interest and that the States shall continue to regulate and tax it, unless Congress specifically legislates on the subject matter to the contrary. Second. A moratorium is declared making ineffective the Sherman and Clayton Acts for a time specified in section 4(a) of the bill so that States can adjust their laws on the subject. The Judiciary Committee made a careful study of the problems involved and has reported the bill and I believe that the bill as it came from the committee is not ambiguous, but carries out the purposes above set forth by me.

The pending amendment, in my judgment, nullifies the first purpose of the bill. Although the Clayton and Sherman Acts are suspended by section 4(a), they shall be construed to invalidate, impair, or supersede any law enacted by a State for the purpose of regulating the business of insurance or which imposes a fee or tax upon such business, if the pending amendment is adopted.

Many insurance companies refuse to pay licenses and taxes in many States, I am informed, because of the Supreme Court decision in United States against Southern Underwriters Association et al., and **to now except those two acts, which**

formed the basis of the decision and, in effect, state that they shall be construed to invalidate State laws on the question of taxation and regulation of the insurance business is bound to lead to much confusion.

MR. FERGUSON. I take it the language now used would be very confusing. The bill excludes all acts except those enumerated. We will have to change the language so as to make all other acts not applicable except the Sherman Act and the Clayton Act. Then we except those acts in the next section.

MR. ELLENDER. Such language put in the proper place would cover the objection I suggested to the pending amendment. However, I am not advocating it, because I think the bill as reported by the Judiciary Committee is clear. **I think all of us agree that the States should retain the right of regulating and taxing the insurance business within their respective borders.**

MR. RADCLIFFE. First it is provided that they shall invalidate State laws. Then later it is said that there shall be a moratorium. That is not the most felicitous way of stating it. If it can be construed that section 4 clearly modifies section 2(b), we are safe; but it seems to me that is running a rather unnecessary risk, because subsection (b) of section 2 clearly states that those two acts shall invalidate State laws.

MR. WHERRY. Mr. President, I should like to ask the distinguished Senator from Michigan a question. If what he says be true, why is it necessary to have an amendment to subsection (b) of section 2 at all? I think we could put both sections together and do exactly what is desired.

As a member of the Committee on the Judiciary, I am for the bill as it came from the committee.

The reason I voted for it was that it would put the regulation of the insurance business in the hands of the States. That is the important thing in this bill. I believe that the amendments which have been suggested would be confusing and conflicting. In my judgment the bill would be better if it were left as it was reported from the committee than if we were to try to amend it on the floor of the Senate. I hope the amendments will be rejected.

HOUSE

Page 1086:

MR. GRAHAM. Is it not a matter of record that since the passage of the bill referred to in the House, the Supreme Court has denied a petition for a rehearing of the Southeastern Underwriters' Association, which makes this action imperative?

MR. WALTER. Yes; an application was made to the Supreme Court for a rehearing, and it is, indeed, unfortunate there was not a rehearing participated in by a majority of the Court. I think this decision by a vote of 4 to 3 was shocking, to say the least, because where a well-accepted rule of law is changed, as Justice Marshall put it a great many years ago, the change should come only when a majority of the Court participate in the decision. **This is another reason why it is imperative that something be done immediately; but the most important practical phase of the whole situation is that taxes due and owing to the insurance departments of the several States are collected between the 20th of February and the 10th of March.** It will be easy to compromise our views with the bill passed by the Senate; our views are contained in the bill recommended by the Committee on the Judiciary of the House. (This statement was made on February 14th).

Page 1087:

MR. HANCOCK. Mr. Speaker, the unfortunate decision of the Supreme Court in the Southeastern Underwriters case, decided last June, has thrown the insurance business into a state of utter confusion. That decision by four members out of nine members of the Supreme Court changed the established law of the land, **it reversed the will of Congress and created a new policy regarding the control and regulation of the business of insurance.** The decision has been rightly called judicial legislation. * * * **Heretofore the insurance business has been subject to regulation by the States because an unbroken line of decisions of the Supreme Court have held not only that insurance is not interstate commerce, but that it is not commerce at all. The decision maker insurance interstate commerce, and therefore subject to all the statutes we have enacted dealing with interstate commerce. There are four, I believe: The Federal Trade Commission Act, the Patman Antidiscrimination Act, the Clayton Act, and the Sherman Act.**

Unfortunately, we cannot repeal the decision of the Supreme Court. What we can do, however, is to suspend the operation of the statutes we have passed, limit their scope, and grant exemptions or exceptions.

Page 1088:

MR. BRADLEY of Pennsylvania. I want to vote for this bill if it is a compromise agreement between all parties concerned. But I am in a quandary because the Antitrust Division of the Department of Justice informed me just 10 minutes ago they were irrevocably opposed to the bill.

MR. ANDERSON of New Mexico. They are; and that is exactly what I want to discuss, if the gentleman will permit me to do so.

Page 1089:

MR. PATMAN. **Is it not a fact that section 3 is permanent law—not just a moratorium? It goes away beyond any agreement.**

MR. ANDERSON of New Mexico. I will not argue with the gentleman because I am not a lawyer, but I know it is too bad if we do not vote down the previous question and substitute the bill which everybody has agreed upon.

Pages 1089-1090:

MR. COCHRAN. Why cannot the gentleman take out the section that relates to the Federal Trade Commission and the Robinson-Patman Act?

MR. ANDERSON of New Mexico. I have tried to explain it. **I want to see a bill passed that can be enacted into law prior to the closing days of February,** at which time the insurance companies must pay their taxes to maintain the insurance departments in the various States. **There is a specific date involved. Personally I would like to see it out, but I want to see a bill passed today.**

THE SPEAKER. The time of the gentleman from New Mexico has expired.

MR. WALTER. Mr. Speaker, I yield 10 minutes to the gentleman from Iowa (Mr. Gwynne).

MR. GWYNNE, of Iowa. Mr. Speaker, when the Supreme Court last year decided the Southeastern Underwriters case it immediately made applicable to the business of insurance many laws that we have heretofore passed regulating interstate commerce. **When we passed those acts, Congress did not have in mind insurance; as a matter of fact when Congress passed the Sherman Act it was with the distinct understanding that it did**

not apply to insurance, because insurance at that time was not interstate commerce, under Supreme Court decisions. The net result of the Supreme Court decision therefore was to put the Federal Government in the field of control then being exercised by the States. The methods of control exercised by the States and by the Federal Government are conflicting, and the sole purpose of this bill is to take out as much of that conflict as possible until we can determine whether Congress will regulate insurance, or whether it will permit the States to regulate it.

Page 1092:

MR. SPRINGER. This bill provides a moratorium. That is the important feature contained in this bill. Everyone knows that great consternation developed following the decision in the case of the United States against Southeastern Underwriters Association, et al. The States did not know what to do following that decision, and the insurance companies certainly did not know what to do. **The question of taxation was involved, and the question of the control and regulation of insurance companies by the several States was also involved. At the present moment, unless this measure, or similar legislation, is passed to protect the States and protect the insurance companies with regard to their control and the question of taxation, utter confusion will result and utter chaos will reign in the several States.**

My thought has been, as has been stated on the floor of the House by others, that I would far prefer to take the question of insurance entirely out of the commerce clause of the Constitution and entirely away from any Government control. But this emergency is immediate and it is necessary to pass this legislation now. The States do not know what to do with respect to the collection of taxes

and the insurance companies do not know what to do with respect to the payment of taxes. The several States have no charted course with respect to the control or the regulation of insurance companies, since the case above cited, has been decided. Confusion and chaos has been brought about by that very peculiar decision.

Mr. Speaker, since this measure has been pending many insurance companies, and many State officers, have written to me respecting that resulting confusion. It is essential that this measure be passed promptly in order to avoid confusion in the future.

This measure seeks only to establish a moratorium until January 1948 **in order that the several States may continue their control and regulations over the insurance business** and to proceed with the collection of taxes, in the manner and form intended by Congress. At the end of that period I hope—and I am confident a majority of the Members also hope—that this matter may be worked out in a proper manner—**preserving to the several States their rights to control and regulate the insurance business within such States, and to collect the taxes now permitted—all without Government interference.** I intend to support the measure.

Page 1093:

MR. SUMNERS of Texas. Mr. Speaker, in the time allotted to me I hope I may be able to state the facts with reference to the insurance situation in such a manner as to be helpful to the Members in making up their minds. **Prior to the decision of the Supreme Court, which has been referred to, the business of insurance was in the control of the States. The decision of the Supreme Court establishing the interstate commerce characteristics in insurance disestablished State control in**

large measure, established Federal power, and put the whole thing in a state of chaos, as has been discussed by Members who have preceded me. I am one of those who regret this shift of governmental responsibility. I know it is not an easy job. A good many people in this country, however, feel the time is at hand when the States should have some hard, tough meat to chew on if they are to retain their governmental teeth. The fact that there are difficulties in the State handling of this matter is not, in the judgment of some people, a good reason why it ought to be moved into the Federal Government. But since this decision of the Supreme Court the whole thing is in a state of chaos, as I have stated. Insurance companies are hesitating to pay taxes to the respective States, and so forth. This bill is brought here for the purpose of creating a moratorium until everybody can find out just what the situation is and what should be done about it, what can be done about it. That is the purpose of the bill.

MR. PATMAN. Mr. Speaker, will the gentleman yield on that point?

MR. SUMNERS of Texas. I will be glad to yield.

MR. PATMAN. **The gentleman has stated it is a moratorium. Is not section 3 permanent law?**

MR. SUMNERS of Texas. I get the purport of the gentleman's question. I think, and I am very candid with the gentleman, section 3 should at least be moved down into section 4, where the expiration date is 1948. **But section 3 is not permanent law in an absolute sense, of course. Congress can repeal section 3 at any time.** I do not want to dodge the point. I agree with the gentleman. I think it ought to be down in section 4, but it is not permanent law except in a technical sense.

MR. KEFAUVER. Mr. Speaker, will the gentleman yield?

MR. SUMNERS of Texas. I yield to the gentleman from Tennessee.

MR. KEFAUVER. As a matter of fact, would not section 3 be subject to be changed in conference?

MR. SUMNERS of Texas. I think we can do something about it.

MR. PATMAN. No; the gentleman is mistaken.

MR. SUMNERS of Texas. I do not know whether it can or not, but it does not make so much difference, because it is not permanent law except in the sense that it has no expiration date. Congress could repeal it even before 1948. Section 3 suspends no law or power which obtained before the Supreme Court decision referred to. Section 3 is in line with the moratorium objective, lacking only the expiration date. It is to be suspended. I want it distinctly understood, however, I would be willing to change it in conference so as to make its suspension terminate in 1948. I think perhaps it can be done. If it cannot, I would support an independent act, if necessary. Let me speak now to the point which my distinguished friend, for whom I have great respect, the gentleman from New Mexico (Mr. Anderson), has raised. He objects to the elimination from section 4. I quote:

> For the purpose of enabling adjustments to be made and legislation to be adopted by the several States and Congress.

That language violates the principle of absolute moratorium and ought to be out of this bill. That is my position. It is not substantive law, I admit, but I hope in the intervening time we may be able to work out an arrangement under which

the Federal Government may work out a policy which will be as adjusted, as possible, to the desire of the Congress and the people and that the States be aided and not hindered in assuming more and more governmental responsibility.

Mr. Speaker, **if in the interim we can work out a system that would reestablish the power of the States to control insurance, would not that be a good thing to do? With all the power in this country moving into the Federal Government ought we not try to halt that movement if we can? I do not want an expression in this bill declaring that the moratorium is exclusively for the purpose of enabling the States to accommodate themselves to this new expression of Federal power. I want this time to be spent in seeing if we cannot work out a plan to contract in some degree this Federal power.** At least that time should be not committed. It should be an open period for broad examination of the whole matter for everybody—those who want more power in Washington and those who want less.

Proceedings and Debates of the 79th Congress, Second Session, Vol. 91, Part 2, February 26, 1945 to March 26, 1945

SENATE

Page 1442:

MR. MURDOCK. As I understand the conference report which is now before the Senate, it provides for a 3-year moratorium, which is fixed as ending on January 1, 1948, against the invoking of the Sherman Act and the Clayton Act, **and it provides that they shall again be in force after that period without any affirmative action on the part of the Congress, except as regulatory matters have been enacted by the States relating to subjects covered by those acts.**

MR. McCARRAN. **During the moratorium, Regulatory acts must be enacted by the several States in each of the several States. Otherwise the antitrust acts become effective after January 1, 1948.**

MR. MURDOCK. But is it not the purpose of the bill and does not the bill accomplish this—

MR. McCARRAN. It accomplishes a moratorium for 3 years against the operation of the acts mentioned, namely, the Sherman Antitrust Act, the Clayton Act, the Federal Trade Commission Act, as amended, and the Robinson-Patman Anti-discrimination Act.

MR. MURDOCK. So that during the moratorium it is intended, is it not, that the States shall affirmatively step into the regulation of the insurance business?

MR. McCARRAN. That is correct.

MR. MURDOCK. **And it is intended that on the expiration of the moratorium the Sherman Act, the Clayton Act, and the other acts mentioned will again become effective except—**

MR. McCARRAN. **Except as the States themselves have provided regulations.**

MR. MURDOCK. I thank the Senator.

MR. ELLENDER. Mr. President, will the Senator yield?

MR. McCARRAN. I yield.

MR. ELLENDER. At the end of the 3-year period will the taxing and regulatory powers of the States be in anywise affected should the Congress not take any action at all?

MR. McCARRAN. No; they will not be affected.

MR. ELLENDER. They will not be affected?

MR. McCARRAN. That is correct.

Mr. President, let me make one statement which I think should be placed in the Record here. It should be stated here, as it was stated in the report which went to the House, from which I read that—

> It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the Southeastern Underwriters Association case. Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, subject, always, however, to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in Allgeyer v. Louisiana (165 U. S. 578); St. Louis Cotton Compress Co. v. Arkansas (260 U. S. 346); and Connecticut General Insurance Co. v. Johnson (303 U. S. 77). ——

That expression should be made a part of this explanation. In other words, **we give to the States no more powers than those they previously had, and we take none from them.**

Page 1443:

MR. PEPPER. I have read hastily the conference report, but I am a little disturbed by what I have discovered in paragraph (b) of Section 2. I read beginning with section 2(a):

> Sec. 2(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such act specifically relates to the business of insurance; Provided, That after January 1, 1948, the act of July 2, 1890, as amended, known as the Sherman Act, and the act of October 15, 1914, as amended, known as the Clayton Act, and the act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Does that mean that after January 1, 1948, the States may determine whether or not the Sherman and the other acts become applicable to the business of insurance?

MR. McCARRAN. **The answer to that question is "Yes". During the 3-year moratorium the States may, if they see fit to do so, enact legislation for the purpose of regulation. If they do enact such legislation, to the extent that they regulate they will have taken the business of insurance in the respective States out from under the Sherman Antitrust Act, the Clayton Act, and the other acts. If during the moratorium the States do not enact legislation for regulatory purposes, then on January 1, 1948, the Sherman Act, the Clayton Act, and the other acts will become immediately applicable.**

Page 1444:

MR. WHITE. **Mr. President, is it not perfectly clear that the force and effect of these Federal statutes may be applicable and shall be applicable to whatever extent the State law fails to occupy the ground and engage in regulation?** As I take it, there are two jurisdictions.

MR. McCARRAN. There always are.

MR. WHITE. **There is the State, authorized to act to whatever extent seems proper.**

MR. McCARRAN. That is correct.

MR. WHITE. Then the Federal Government can come in, and it does come in and may legislate beyond the limit of the State legislation.

MR. McCARRAN. **To the extent that the State does not regulate.**

MR. WHITE. **To the extent that the State does not regulate.**

MR. MURDOCK. Mr. President, does the Senator from Maine take the position that, under the conference report, it becomes necessary for the Congress to act again affirmatively, subsequent to any State action taken?

MR. WHITE. Not at all; that is not my view of the matter at all. **My view is that the State may regulate. If, however, the State goes only to the point indicated, then these Federal statutes apply throughout the whole field beyond the scope of the State's activity.**

MR. McCARRAN. **That is a correct statement.**

MR. MURDOCK. Without any subsequent action on the part of Congress?

MR. WHITE. Without any subsequent action on the part of Congress.

MR. MURDOCK. I think that therein lies a very important feature of this whole matter. **I agree thoroughly with the Senator from Maine that insofar as the States step into the picture affirmatively and act by regulation, they may do so.** As the Senator from Wyoming has said, we convey no authority, we simply recognize their right to regulate. **Insofar as they fail to cover the same**

ground covered by the Sherman Act and the Clayton Act, those acts become effective again.

MR. PEPPER. Mr. President, I wish to address myself to the subject, then, and I shall simply have to delay the Senate, because I wish to discuss the report. I shall be frank; I think the conference report bill practically destroys the effect of the Supreme Court decision, and I am against that. At least I wish to have time to go into it. I do not know of any emergency which requires that the report be agreed to this afternoon.

I should appreciate the privilege of considering the matter a little.

MR. McCARRAN. The Senator is correct regarding the 3-year moratorium, but beyond that he is in error.

MR. PEPPER. I would not expect Senators, even if they had the power, to change the report on the floor, and I am perfectly willing to have provided a 3 or 4 or 5 year moratorium, but I am not willing to see the decision of the Supreme Court emasculated. I wish to study the matter before I can give my consent to it. Otherwise, I certainly wish to address myself to it.

MR. McCARRAN. Just one question to the Senator, then I shall yield and the conference report may go over, so far as I am concerned. Does the Senator oppose State regulation of insurance?

MR. PEPPER. I do not oppose State regulation which is not inconsistent with the operation of the Sherman antitrust Act and the Clayton Act. **On matters of taxation, general regulation, and all that sort of thing, I think the States should regulate, but I think that now that insurance has been brought, by the decision of the Supreme Court, up to the bar of the Clayton Act and the Sherman Act, we should not give the insurance companies immunity from the applicability of those acts.**

Pages 1477-1478:

MR. PEPPER. Mr. President, if I may have the attention of the Senate for only a few minutes, I promise not to trespass unreasonably upon its patience.

We all know that last June, in the Southeastern Underwriters case, the Supreme Court of the United States held that the insurance business came within the interstate commerce clause of the Constitution, and that therefore the Clayton Act and the Sherman Antitrust Act were applicable to such business.

Mr. President, an effort was made by Senators and Representatives while this case was pending in the Supreme Court to enact legislation which would have explicitly exempted the insurance business from the applicability of the Sherman and Clayton Acts. However, the legislation which had been submitted was not adopted by the Senate, although, I believe, it was adopted by the House. After the decision of the Supreme Court holding that insurance is interstate commerce within the meaning of the commerce clause of the Constitution, legislation has been initiated in both Houses of the Congress to affect in one way or another the Supreme Court's decision. **I feel that the adoption of the conference report which embodies such legislation would have the effect of emasculating the Supreme Court's decision, and holding by congressional action that the Sherman and the Clayton Acts do not apply for all practical purposes to the business of insurance.** That is the exact point to which I wish to address myself.

The exact language in which I wish to direct criticism appears in section 2(b) of the conference report now lying on the desks of Senators, and reading as follows:

PROVIDED, That after January 1, 1948, the act of July 2, 1890, as amended, known as the Sherman Act, and the act of October 15, 1914, as amended, known as the Clayton Act, and the act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

I am not complaining about any other provision of the conference report. In other sections of the conference report it is provided that the States shall have the power to regulate and tax the business of insurance. I am not complaining about that. In another part of the conference report it is provided that there shall be an unqualified moratorium on the applicability of the Sherman Act, the Clayton Act, the Federal Trade Commission Act, and the Robinson-Patman Antidiscrimination Act to the business of insurance until January 1, 1948. In other words, none of those four Federal acts would be applicable to the business of insurance until January 1, 1948. That would be a longer moratorium than the President, in two letters to which I will refer, indicated he would prefer, but I am not complaining even about a 3-year moratorium. There is considerable justification for the States being given an opportunity to modify their laws respecting the insurance business so that they shall not be in conflict with the four Federal acts enumerated in the provision to which I have referred. **But I do object, Mr. President,—and I believe the Senate, when it reflects upon the matter, will object—to the provision which I read providing that for all future time the Sherman Act, the Clayton Act, and the Federal Trade Commission Act shall not apply to the business of insurance except in a State which has not regulated the insurance business or to the extent a State has not denied the effect of such Federal acts.**

Mr. President, if that language had contained the limitation that the State regulation, in order to be valid, must not be inconsistent with the Clayton Act or the Sherman Act, I should have no objection to it. But under the language which I have read, and to which I am addressing my criticism, namely, that the Sherman Act, the Clayton Act, and the Federal Trade Commission Act shall be applicable to the business of insurance to the extent that such business is not regulated by State law, the State would be given the right to determine when, whether, and to what degree those three acts were applicable to the business of insurance. The various States, without any limitation upon their power, or without any requirement that State regulation shall not be inconsistent with the Sherman Act, the Clayton Act, and the Federal Trade Commission Act—

MR. McCARRAN. Mr. President, will the Senator yield?

MR. PEPPER. I yield.

MR. McCARRAN. The Senator undoubtedly recognizes the fact that the Congress of the United States would not attempt to tell a State how and upon what subject it should legislate. The Senator will agree with that statement, will he not?

MR. PEPPER. On the contrary, Mr. President, I may say that I am not willing to leave the applicability and the effectiveness of the Sherman Act and the Clayton Act to the decision of a State legislature. By doing so the Congress would be abrogating its power with respect to the subject exclusively to the several legislatures, that is, if we pass this law without imposing any limitation upon the States in the exercise of their regulatory power that it must be not inconsistent with the Clayton Act or the Sherman Act.

Page 1479:

MR. PEPPER. * * * * The Senate, when it passed this bill, provided for a moratorium, which is all right. It was longer than the President seemed to indicate, but no one raised any question about the moratorium being 3 years. The House carried the same provision and provided a 3-year moratorium, and I am not complaining about that, and if the conferees had not changed the provisions of the Senate bill and the House bill, but had put in everything they have in this conference report, leaving 3 years as the absolute moratorium during which these laws could not apply, I should be willing to accede to that. **But the language to which I object is the language which I read in the conference report, which carries, not a 3-year moratorium, but a perpetual moratorium.** This is the language to which I object:

> PROVIDED, That after January 1, 1948, the act of July 2, 1890, as amended, known as the Sherman Act, and the act of October 15, 1914, as amended, known as the Clayton Act, and the act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Page 1480:

MR. MURDOCK. **The Senator in speaking of the language of the report indicates that it would permit absolute preemption of the field by the State, so far as regulation of insurance is concerned; that it would allow a State to repeal all its insurance laws and give carte blanche to insurance companies.**

MR. PEPPER. A State has the right, without any legislation, to regulate anything pertaining to the insurance business, and to the extent that

it regulates it has legitimized in its regulations so far as these Federal acts are concerned, and **by the proposed legislation we would give them the right to go as far toward cutting down or toward emasculating the Sherman Act and the Clayton Act as they choose to go.** The able Senator from Utah in his argument concerning the legislative history of the bill on the 25th of January pointed out time after time that even the original bill to a considerable extent gave that authority, and then when there was some clarification of that in section 2 by the amendment of the Senator from Michigan (Mr. Ferguson) to make the Sherman Act and the Clayton Act particularly applicable, then they came right back in the conference—no doubt unintentionally, **but they came right back in the conference and in my opinion gave the States the right to do anything they wanted to do relative to regulation without any limitation that it must not be an encroachment upon the Sherman Act and the Clayton Act.**

Page 1484:

MR. PEPPER. In a moment I will yield.

Mr. President, after the House passed a bill that provided a moratorium, giving the States the opportunity to correct their laws and bring them into conformity with the Sherman Act and the Clayton Act, after the Senate did the same thing, after the Attorney General came here and testified before the Senate Judiciary Committee that he had no objection to a reasonable moratorium in order to let them put their house in order, and after the President wrote two letters to the able Senator from Maryland saying first he had no objection to a reasonable moratorium, what are we faced with here today? A carte blanche authority at this late date which has been contained in no previous legislation, which has not passed the House or the

Senate; **we are now confronted with the language of this conference report which for the first time gives the States carte blanche to legitimatize the very vices against which the Clayton Act and the Sherman Act were directed, to which acts the insurance companies at last have been made amenable by the decision of the United States Supreme Court.**

MR. MURDOCK. * * * The Senator's argument is the same argument I would have made here a few months ago; but, confronted with the fact that we had to take either the bill which was passed by the House at the last session or something else, **I finally consented to support the conference report, which, in my opinion, not only grants a moratorium but allows the States to come affirmatively into the picture. If they do something objectionable, something we do not want done, then the Congress reserves the right to strike it down, and, with arguments such as those the able Senator from Florida is making, we could make both the Clayton Act and the Sherman Act applicable in their full vigor against anything the States might do.**

So, I ask **why not join us at this time and give the States the opportunity under this conference report to do what, in my opinion, they will do, and that is the right thing.**

age 1485:

MR. PEPPER. * * * * But, Mr. President, right here, for the first time, **this conference report is brought up, with the full knowledge that the legal effect of it, and the intended effect, not intended by the able Senator from Wyoming and the able Senator from Utah, but by the proponents of this series of legislation, is that the States shall have authority to repeal, pro tanto, the applicability of the Sherman Act and the Clayton Act to insurance within their borders. To accept that view at**

first blush without a protest, but giving countenance and acquiescence to that policy, seems to me to impugn the integrity of the Supreme Court decision, and our long insistence upon adherence to the Sherman Act and the Clayton Act.

Pages 1486-1487:

MR. O'MAHONEY. In response to the Senator's question, let me say that one of the House conferees, in the course of the conference, used this sentence, which I thought was extremely apt: **"This is a bill to authorize the States to regulate the insurance business; and if the States do not regulate it, the Federal Government can."**

From these extracts it will be seen that Congress fully realized and intended that the bill approved in the Conference Report, which was the one actually enacted into law as the McCarran-Ferguson Act, **definitely gave the States complete authority to regulate the business of insurance and all persons engaged therein.**

EXHIBIT 1.

IN THE SENATE OF THE UNITED STATES

79th CONGRESS - 1st Session

January 18, 1945

S. 340

Mr. McCarran (for himself and Mr. Ferguson) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To express the intent of the Congress with reference to the regulation of the business of insurance.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

SEC. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the

several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically so provides.

SEC. 3. Nothing contained in the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, or the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall apply to the business of insurance or to acts in the conduct of that business.

SEC. 4. (a) For the purpose of enabling adjustments to be made and legislation to be adopted by the several States and Congress, until June 1, 1947, the Act of July 2, 1890, as amended, known as the Sherman Act, shall not apply to the business of insurance, or to acts in the conduct of such business, and until January 1, 1948, the Act of October 15, 1914, as amended, known as the Clayton Act, shall not apply to such business or to acts in the conduct thereof.

(b) Nothing contained in this section shall render the said Sherman Act inapplicable to any act of boycott, coercion, or intimidation.

SEC. 5. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or

the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938.

SEC. 6. As used in this Act, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

Sec. 7. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected.

EXHIBIT 2.

IN THE SENATE OF THE UNITED STATES

79th CONGRESS - 1st Session

Calendar No. 18

S. 340

[Report No. 20]

January 18, 1945

Mr. McCarran (for himself and Mr. Ferguson) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

January 24, 1945

Reported, under authority of the order of the Senate of January 22, 1945, by Mr. McCarran, with an amendment

[Insert the part printed in italic]

A BILL

To express the intent of the Congress with reference to the regulation of the business of insurance.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress hereby declares that the

continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

SEC. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically so provides.

SEC. 3. Nothing contained in the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, or the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall apply to the business of insurance or to acts in the conduct of that business.

SEC. 4. (a) For the purpose of enabling adjustments to be made and legislation to be adopted by the several States and Congress, until June 1, 1947, the Act of July 2, 1890, as amended, known as the Sherman Act, shall not apply to the business of insurance, or to acts in the conduct of such business, and until January 1, 1948, the Act of October 15, 1914, as amended, known as the Clayton Act, shall not apply to such business or to acts in the conduct thereof.

(b) Nothing contained in this section shall render the said Sherman Act inapplicable to any *agreement or* act of boycott, coercion, or intimidation.

SEC. 5. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938.

SEC. 6. As used in this Act, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

SEC. 7. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected.

EXHIBIT 3.

Calendar No. 18

79th CONGRESS - 1st Session

SENATE

Report No. 20

EXPRESSING THE INTENT OF THE CONGRESS WITH REFERENCE TO THE REGULATION OF THE BUSINESS OF INSURANCE

January 24, 1945.—Ordered to be printed

Mr. McCarran, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 340]

The Committee on the Judiciary, to whom was referred the bill (S. 340) to express the intent of the Congress with reference to the regulation of the business of insurance, having considered the same, favorably report the bill to the Senate with an amendment with the recommendation that the bill, as amended, do pass.

On page 2, line 23, after the word "any", insert the words "agreement or".

GENERAL STATEMENT

From its beginning the business of insurance has been regarded as a local matter, to be subject to and regulated by the laws of the several States. This view has been fostered and augmented by decisions of the United States Supreme Court for a period of more than 75 years, leading to the generally accepted doctrine that the business of insurance was not subject to Federal law.

On June 5, 1944, in the case of *U. S. v. Southeastern Underwriters Association et al.*, the Supreme Court decided that the business of insurance was commerce and, therefore, subject to the Sherman Act of July 2, 1890, as amended, and the Clayton Act of October 15, 1914, as amended.

The Attorney General, in several appearances before the Judiciary Committee, frankly stated that the Department of Justice had no opposition to an extension of time to the insurance industry in order to make necessary adjustments to this decision.

Inevitable uncertainties which followed the handing down of the decision in the *Southeastern Underwriters Association case*, with respect to the constitutionality of State laws, have raised questions in the minds of insurance executives, State insurance officials, and others as to the validity of State tax laws as well as State regulatory provisions; thus making desirable legislation by the Congress to stabilize the general situation.

Bills attempting to deal with the problem were considered in both the House and the Senate during the

Seventy-eighth Congress, but failed of enactment. Your committee believes there is urgent need for an immediate expression of policy by the Congress with respect to the continued regulation of the business of insurance by the respective States. Already many insurance companies have refused, while others have threatened refusal to comply with State tax laws, as well as with other State regulations, on the ground that to do so, when such laws may subsequently be held unconstitutional in keeping with the precedent-smashing decision in the *Southeastern Underwriters case*, will subject insurance executives to both civil and criminal actions for misappropriation of company funds.

The committee has therefore given immediate consideration to S. 340, together with a similar measure (S. 12, introduced by Senators O'Mahoney and Hatch), so that the several States may know that the Congress desires to protect the continued regulation and taxation of the business of insurance by the several States, and thus enables insurance companies to comply with State laws. What is more, the Congress proposes by this bill to secure adequate regulation and control of the insurance business.

PURPOSE OF THE BILL

The purpose of the bill is twofold: (1) To declare that the continued regulation and taxation by the several States of the business of insurance is in the public interest; and (2) to assure a more adequate regulation of this business in the States by suspending the application of the Sherman and Clayton Acts for approximately two sessions of the State legislatures, so that the States and the Congress may consider legislation during that period. It

should be noted that this bill, by the moratorium proposed therein, does not repeal the Sherman and Clayton Acts, but opportunity will have been granted for the States to permit agreements and contracts by insurance companies which otherwise might be in violation of the Sherman and Clayton Acts. It should be noted further that no moratorium is granted from the Sherman Act relative to agreements or acts of boycott, coercion, or intimidation.

ANALYSIS BY SECTION.

Section 1 declares that the continued regulation and taxation by the States of the business of insurance is in the public interest.

Section 2 provides that the insurance business, and all persons engaged in such business, shall be subject to State laws relating to the regulation and taxation of such business; and *(b)* that no act of Congress shall be construed to invalidate, impair, or supersede any State law which regulates or taxes the insurance business, unless such act specifically so provides.

Section 3 provides that the Federal Trade Commission Act and the Robinson-Patman Antidiscrimination Act shall not apply to the insurance business, or to acts in the conduct of such business.

Section 4 suspends the application of the Sherman Act to the business of insurance until June 1, 1947, and suspends the application of the Clayton Act until January 1, 1948—

for the purpose of enabling adjustments to be made and legislation to be adopted by the several States and Congress—

and *(b)* provides that at no time are the prohibitions in the Sherman Act against any agreement or act of boycott, coercion, or intimidation, suspended. These provisions of the Sherman Act remain in full force and effect.

Section 5 provides that the enactment of this act shall not affect, in any manner, the present application of the National Labor Relations Act, or the Fair Labor Standards Act, to the business of insurance.

Section 6 defines the term "State."

Section 7 provides for separability of provisions.

CONCLUSION

In the considered judgment of your committee, S. 340 represents a most commendable effort on the part of insurance companies and State insurance commissioners to effect the adjustments and reorganization in and among the financial operations of insurance companies and in State laws which have been made necessary by the decision in the *Southeastern Underwriters case.* [It should be emphasized that the bill has received the overwhelming endorsement of the principal national organizations of State insurance commissioners, insurance executives, agents, brokers, and underwriters, including the National Association of Insurance Commissioners, the American Life Convention, the American Mutual Alliance, the Association of Casualty and Surety Executives, the Inland Marine Underwriters Association, the National Associa-

tion of Insurance Agents, the National Association of Mutual Insurance Agents, the National Board of Fire Underwriters, Insurance Executives Association, National Association of Insurance Brokers, Inc., the National Association of Casualty and Surety Agents, the Surety Association of America, the National Fraternal Congress of America, and the Health and Accident Underwriters Conference.] Opportunity is granted to the State legislatures during their present and forthcoming sessions for 1945, 1946, and 1947 to consider the welfare of policyholders.

Enactment of this bill will (1) remove existing doubts as to the right of the States to regulate and tax the business of insurance, and (2) secure more adequate regulation of such business.

EXHIBIT 4.

IN THE HOUSE OF REPRESENTATIVES

79th CONGRESS - 1st Session

S. 340

January 29, 1945

Referred to the Committee on the Judiciary

AN ACT

To express the intent of the Congress with reference to the regulation of the business of insurance.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Sec. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress, except the Act of July 2, 1890, as amended, known as the Sherman Act, and/or the Act of October 15, 1914, as amended, known as the Clayton Act, shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically so provides.

Sec. 3. Nothing contained in the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, or the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall apply to the business of insurance or to acts in the conduct of that business.

Sec. 4. (a) For the purpose of enabling adjustments to be made and legislation to be adopted by the several States and Congress, until June 1, 1947, the Act of July 2, 1890, as amended, known as the Sherman Act, shall not apply to the business of insurance, or to acts in the conduct of such business, and until January 1, 1948, the Act of October 15, 1914, as amended, known as the Clayton Act, shall not apply to such business or to acts in the conduct thereof.

(b) Nothing contained in this section shall render the said Sherman Act inapplicable to any agreement or act of boycott, coercion, or intimidation.

Sec. 5. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or

the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938.

Sec. 6. As used in this Act, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

Sec. 7. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected.

Passed the Senate January 25, 1945.

Attest: EDWIN A. HALSEY,
Secretary.

EXHIBIT 5.

IN THE HOUSE OF REPRESENTATIVES
79th CONGRESS - 1st Session

H. R. 1973

February 2, 1945

Mr. Walter introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To express the intent of the Congress with reference to the regulation of the business of insurance.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Sec. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insur-

ance, or which imposes a fee or tax upon such business, unless such Act specifically so provides.

Sec. 3. Nothing contained in the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, or the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall apply to the business of insurance or to acts in the conduct of that business.

Sec. 4. (a) Until January 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this section shall render the said Sherman Act inapplicable to any act of boycott, coercion, or intimidation.

Sec. 5. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938 or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

Sec. 6. As used in this Act, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

Sec. 7. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected.

EXHIBIT 6.

IN THE HOUSE OF REPRESENTATIVES

79th CONGRESS - 1st Session

House Calendar No. 35

H. R. 1973

[Report No. 68]

February 2, 1945

Mr. Walter introduced the following bill: which was referred to the Committee on the Judiciary

February 8, 1945

Reported with an amendment, referred to the House Calendar, and ordered to be printed
[Insert the part printed in italic]

A BILL

To express the intent of the Congress with reference to the regulation of the business of insurance.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress hereby declares that the

continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

SEC. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically so provides.

SEC. 3. Nothing contained in the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, or the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall apply to the business of insurance or to acts in the conduct of that business.

Sec. 4. (a) Until January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this section shall render the said Sherman Act inapplicable to any act of boycott, coercion, or intimidation.

SEC. 5. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938 or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

SEC. 6. As used in this Act, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

SEC. 7. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected.

EXHIBIT 7.

HOUSE OF REPRESENTATIVES

79th CONGRESS - 1st Session

Report No. 68

EXPRESSING THE INTENT OF THE CONGRESS WITH REFERENCE TO THE REGULATION OF THE BUSINESS OF INSURANCE

February 8, 1945.—Referred to the House Calendar and ordered to be printed

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Mr. Walter, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. R. 1973]

The Committee on the Judiciary, to whom was referred the bill (H. R. 1973) to express the intent of the Congress with reference to the regulation of the business of insurance, having considered the same, report favorably thereon with an amendment and, as amended, recommended that the bill do pass.

On page 2, line 13, after the word "January", insert the figure "1" and a comma.

GENERAL STATEMENT

From its beginning the business of insurance has been regarded as a local matter, to be subject to and regulated by the laws of the several States. This view has been fostered and augmented by decisions of the United States Supreme Court for a period of more than 75 years, leading to the generally accepted doctrine that the business of insurance was not subject to Federal law.

On June 5, 1944, in the case of *U. S. v. Southeastern Underwriters Association et al.*, the Supreme Court decided that the business of insurance was commerce and, therefore, subject to the Sherman Act of July 2, 1890, as amended, and the Clayton Act of October 15, 1914, as amended.

The Attorney General, in several appearances before the Judiciary Committee, frankly stated that the Department of Justice had no opposition to an extension of time to the insurance industry in order to make necessary adjustments to this decision.

Inevitable uncertainties which followed the handing down of the decision in the *Southeastern Underwriters Association case*, with respect to the constitutionality of State laws, have raised questions in the minds of insurance executives, State insurance officials, and others as to the validity of State tax laws as well as State regulatory provisions; thus making desirable legislation by the Congress to stabilize the general situation.

Bills attempting to deal with the problem were considered in both the House and the Senate during the Seventy-eighth Congress, but failed of enactment. Your com-

mittee believes there is urgent need for an immediate expression of policy by the Congress with respect to the continued regulation of the business of insurance by the respective States. Already many insurance companies have refused, while others have threatened refusal to comply with State tax laws, as well as with other State regulations, on the ground that to do so, when such laws may subsequently be held unconstitutional in keeping with the precedent-smashing decision in the *Southeastern Underwriters case*, will subject insurance executives to both civil and criminal actions for misappropriation of company funds.

The committee has therefore given immediate consideration to S. 340, together with a similar measure, H. R. 1973, so that the several States may know that the Congress desires to protect the continued regulation and taxation of the business of insurance by the several States, and thus enables insurance companies to comply with State laws. What is more, the Congress proposes by this bill to secure adequate regulation and control of the insurance business.

Nothing in this bill is to be so construed as indicating it to be the intent or desire of Congress to require or encourage the several States to enact legislation that would make it compulsory for any insurance company to become a member of rating bureaus or charge uniform rates. It is the opinion of Congress that competitive rates on a sound financial basis are in the public interest.

It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which

they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association case.* Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, subject always, however, to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in *Allgeyer v. Louisiana* (165 U. S. 578), *St. Louis Cotton Compress Co. v. Arkansas* (260 U. S. 346), and *Connecticut General Insurance Co. v. Johnson* (303 U. S. 77), which hold, inter alia, that a State does not have power to tax contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the State or to regulate such transactions in any way.

PURPOSE OF THE BILL

The purpose of the bill is twofold: (1) To declare that the continued regulation and taxation by the several States of the business of insurance is in the public interest; and (2) to assure a more adequate regulation of this business in the States by suspending the application of the Sherman and Clayton Acts for approximately two sessions of the State legislatures, so that the States and the Congress may consider legislation during that period. It should be noted that this bill, by the moratorium proposed therein, does not repeal the Sherman and Clayton Acts, but opportunity will have been granted for the States to permit agreements and contracts by insurance companies which otherwise might be in violation of the Sherman and Clayton Acts. It should be noted further that no moratorium is granted from the Sherman Act relative to agreements or acts of boycott, coercion, or intimidation.

ANALYSIS BY SECTION

Section 1 declares that the continued regulation and taxation by the States of the business of insurance is in the public interest.

Section 2 provides that the insurance business, and all persons engaged in such business, shall be subject to State laws relating to the regulation and taxation of such business; and (*b*) that no act of Congress shall be construed to invalidate, impair, or supersede any State law which regulates or taxes the insurance business, unless such act specifically so provides.

Section 3 provides that the Federal Trade Commission Act and the Robinson-Patman Antidiscrimination Act shall not apply to the insurance business, or to acts in the conduct of such business.

Section 4 suspends the application of the Sherman Act and the Clayton Act to the business of insurance until January 1, 1948, for the purpose of enabling adjustments to be made and legislation to be adopted by the several States and Congress; and (b) provides that at no time are the prohibitions in the Sherman Act against any act of boycott, coercion, or intimidation suspended. These provisions of the Sherman Act remain in full force and effect.

Section 5 provides that the enactment of this act shall not affect, in any manner, the present application of the National Labor Relations Act, the Fair Labor Standards Act, or the Merchant Marine Act, to the business of insurance.

Section 6 defines the term "State."

Section 7 provides for separability of provisions.

CONCLUSION

In the considered judgment of your committee, H. R. 1973 represents a most commendable effort on the part of insurance companies and State insurance commissioners to effect the adjustments and reorganization in and among the financial operations of insurance companies and in State laws which have been made necessary by the decision in the *Southeastern Underwriters case*. It should be emphasized that the bill has received the overwhelming endorsement of the principal national organizations of State insurance commissioners, insurance executives, agents, brokers, and underwriters, including the National Association of Insurance Commissioners, the American Life Convention, the American Mutual Alliance, the Association of Casualty and Surety Executives, the Inland Marine Underwriters Association, the National Association of Insurance Agents, the National Association of Mutual Insurance Agents, the National Board of Fire Underwriters, Insurance Executives Association, National Association of Insurance Brokers, Inc., the National Association of Casualty and Surety Agents, the Surety Association of America, the National Fraternal Congress of America, and the Health and Accident Underwriters Conference. Opportunity is granted to the State legislatures during their present and forthcoming sessions for 1945, 1946, and 1947 to consider the welfare of policyholders.

Enactment of this bill will (1) remove existing doubts as to the right of the States to regulate and tax the business of insurance, and (2) secure more adequate regulation of such business.

EXHIBIT 8.

IN THE HOUSE OF REPRESENTATIVES

79th CONGRESS - 1st Session

House Calendar No. 41

S. 340

[Report No. 143]

January 29, 1945

Referred to the Committee on the Judiciary
February 13, 1945

Reported with an amendment, referred to the House Calendar, and ordered to be printed

[Strike out all after the enacting clause and insert the part printed in italic]

AN ACT

To express the intent of the Congress with reference to the regulation of the business of insurance.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress

assembled, That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

SEC. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress, except the Act of July 2, 1890, as amended, known as the Sherman Act, and/or the Act of October 15, 1914, as amended, known as the Clayton Act, shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically so provides.

SEC. 3. Nothing contained in the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, or the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall apply to the business of insurance or to acts in the conduct of that business.

SEC. 4. (a) For the purpose of enabling adjustments to be made and legislation to be adopted by the several States and Congress, until June 1, 1947, the Act of July 2, 1890, as amended, known as the Sherman Act, shall not apply to the business of insurance, or to acts in the conduct of such business, and until January 1, 1948, the

~~Act of October 15, 1914, as amended, known as the Clayton Act, shall not apply to such business or to acts in the conduct thereof.~~

~~(b) Nothing contained in this section shall render the said Sherman Act inapplicable to any agreement or act of boycott, coercion, or intimidation.~~

~~SEC. 5. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938.~~

~~SEC. 6. As used in this Act, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia.~~

~~SEC. 7. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected.~~

That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

SEC. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the

several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically so provides.

Sec. 3. Nothing contained in the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, or the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall apply to the business of insurance or to acts in the conduct of that business.

SEC. 4. (a) Until January 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this section shall render the said Sherman Act inapplicable to any act of boycott, coercion, or intimidation.

SEC. 5. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938 or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

Sec. 6. As used in this Act, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

Sec. 7. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected.

Passed the Senate January 25, 1945.

Attest: EDWIN A. HALSEY,
Secretary.

EXHIBIT 9.

HOUSE OF REPRESENTATIVES

79th CONGRESS - 1st Session

Report No. 143

EXPRESSING THE INTENT OF THE CONGRESS WITH REFERENCE TO THE REGULATION OF THE BUSINESS OF INSURANCE

February 13, 1945.—Referred to the House Calendar and ordered to be printed

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Mr. Walter, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 340]

The Committee on the Judiciary, to whom was referred the bill (S. 340) to express the intent of the Congress with reference to the regulation of the business of insurance, having considered the same, report favorably thereon with an amendment with the recommendation that the bill, as amended, do pass.

The committee amendment is as follows:

Strike out all after the enacting clause and insert the following:

That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

SEC. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically so provides.

SEC. 3. Nothing contained in the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, or the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall apply to the business of insurance or to acts in the conduct of that business.

SEC. 4. (a) Until January 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this section shall render the said Sherman Act inapplicable to any act of boycott, coercion, or intimidation.

Sec. 5. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938 or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

Sec. 6. As used in this Act, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

Sec. 7. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected.

GENERAL STATEMENT

From its beginning the business of insurance has been regarded as a local matter, to be subject to and regulated by the laws of the several States. This view has been fostered and augmented by decisions of the United States Supreme Court for a period of more than 75 years, leading to the generally accepted doctrine that the business of insurance was not subject to Federal law.

One June 5, 1944, in the case of *U. S.* v. *Southeastern Underwriters Association et al.*, the Supreme Court

decided that the business of insurance was commerce and, therefore, subject to the Sherman Act of July 2, 1890, as amended, and the Clayton Act of October 15, 1914, as amended.

The Attorney General, in several appearances before the Judiciary Committee, frankly stated that the Department of Justice had no opposition to an extension of time to the insurance industry in order to make necessary adjustments to this decision.

Inevitable uncertainties which followed the handing down of the decision in the *Southeastern Underwriters Association case*, with respect to the constitutionality of State laws, have raised questions in the minds of insurance executives, State insurance officials, and others as to the validity of State tax laws as well as State regulatory provisions; thus making desirable legislation by the Congress to stabilize the general situation.

Bills attempting to deal with the problem were considered in both the House and the Senate during the Seventy-eighth Congress, but failed of enactment. Your committee believes there is urgent need for an immediate expression of policy by the Congress with respect to the continued regulation of the business of insurance by the respective States. Already many insurance companies have refused, while others have threatened refusal to comply with State tax laws, as well as with other State regulations, on the ground that to do so, when such laws may subsequently be held unconstitutional in keeping with the precedent-smashing decision in the *Southeastern Underwriters case*, will subject insurance executives to both civil

and criminal actions for misappropriation of company funds.

The committee has therefore given immediate consideration to S. 340, together with a similar measure, H. R. 1973, so that the several States may know that the Congress desires to protect the continued regulation and taxation of the business of insurance by the several States, and thus enables insurance companies to comply with State laws. What is more, the Congress proposes by this bill to secure adequate regulation and control of the insurance business.

Nothing in this bill is to be so construed as indicating it to be the intent or desire of Congress to require or encourage the several States to enact legislation that would make it compulsory for any insurance company to become a member of rating bureaus or charge uniform rates. It is the opinion of Congress that competitive rates on a sound financial basis are in the public interest.

It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association case*. Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, subject always, however, to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in *Allgeyer* v. *Louisiana* (165 U. S. 578), *St. Louis Cotton Compress Co.* v. *Arkansas* (260 U. S. 346), and *Connecticut General Insurance Co.* v. *Johnson*

(303 U. S. 77), which hold, inter alia, that a State does not have power to tax contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the State or to regulate such transactions in any way.

PURPOSE OF THE BILL

The purpose of the bill is twofold: (1) To declare that the continued regulation and taxation by the several States of the business of insurance is in the public interest; and (2) to assure a more adequate regulation of this business in the States by suspending the application of the Sherman and Clayton Acts for approximately two sessions of the State legislatures, so that the States and the Congress may consider legislation during that period. It should be noted that this bill, by the moratorium proposed therein, does not repeal the Sherman and Clayton Acts, but opportunity will have been granted for the States to permit agreements and contracts by insurance companies which otherwise might be in violation of the Sherman and Clayton Acts. It should be noted further that no moratorium is granted from the Sherman Act relative to agreements or acts of boycott, coercion, or intimidation.

ANALYSIS BY SECTION

Section 1 declares that the continued regulation and taxation by the States of the business of insurance is in the public interest.

Section 2 provides that the insurance business, and all persons engaged in such business, shall be subject to State laws relating to the regulation and taxation of such

business; and *(b)* that no act of Congress shall be construed to invalidate, impair, or supersede any State law which regulates or taxes the insurance business, unless such act specifically so provides.

Section 3 provides that the Federal Trade Commission Act and the Robinson-Patman Antidiscrimination Act shall not apply to the insurance business, or to acts in the conduct of such business.

Section 4 suspends the application of the Sherman Act and the Clayton Act to the business of insurance until January 1, 1948; and (b) provides that at no time are the prohibitions in the Sherman Act against any act of boycott, coercion, or intimidation suspended. These provisions of the Sherman Act remain in full force and effect.

Section 5 provides that the enactment of this act shall not affect, in any manner, the present application of the National Labor Relations Act, the Fair Labor Standards Act, or the Merchant Marine Act, to the business of insurance.

Section 6 defines the term "State."

Section 7 provides for separability of provisions.

CONCLUSION

In the considered judgment of your committee, S. 340, as amended, represents a most commendable effort on the part of insurance companies and State insurance commissioners to effect the adjustments and reorganization in and among the financial operations of insurance

companies and in State laws which have been made necessary by the decision in the *Southeastern Underwriters case*. It should be emphasized that the bill has received the overwhelming endorsement of the principal national organizations of State insurance commissioners, insurance executives, agents, brokers, and underwriters, including the National Association of Insurance Commissioners, the American Life Convention, the American Mutual Alliance, the Association of Casualty and Surety Executives, the Inland Marine Underwriters Association, the National Association of Insurance Agents, the National Association of Mutual Insurance Agents, the National Board of Fire Underwriters, Insurance Executives Association, National Association of Insurance Brokers, Inc., the National Association of Casualty and Surety Agents, the Surety Association of America, the National Fraternal Congress of America, and the Health and Accident Underwriters Conference. Opportunity is granted to the State legislatures during their present and forthcoming sessions for 1945, 1946, and 1947 to consider the welfare of policyholders.

Enactment of this bill will (1) remove existing doubts as to the right of the States to regulate and tax the business of insurance, and (2) secure more adequate regulation of such business.

EXHIBIT 10.

HOUSE OF REPRESENTATIVES

79th CONGRESS - 1st Session

Report No. 213

EXPRESSING THE INTENT OF CONGRESS WITH REFERENCE TO THE REGULATION OF THE BUSINESS OF INSURANCE

February 22, 1945.—Ordered to be printed

Mr. Sumners of Texas, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany S. 340]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (S. 340) to express the intent of the Congress with reference to the regulation of the business of insurance, having met, after full and free conference, have

agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment insert the following:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Sec. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal

Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by state law.

Sec. 3. (a) Until January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Anti-discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

Sec. 4. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938 or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

Sec. 5. As used in this Act, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

Sec. 6. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances

other than those as to which it is held invalid, shall not be affected.

And the House agrees to the same.

Hatton W. Sumners,
Francis E. Walter,
C. E. Hancock,
Managers on the part of the House.

Pat McCarran,
Joseph C. O'Mahoney,
Homer Ferguson,
Managers on the part of the Senate.

STATEMENT OF THE MANAGERS ON THE PART OF THE HOUSE

The managers on the part of the House at the conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 340) to express the intent of the Congress with reference to the regulation of the business of insurance, submit the following statement in explanation of the effect of the action agreed upon by the conferees and recommended in the accompanying conference report:

The House amendment struck out all of the Senate bill after the enacting clause. The committee of conference recommends that the Senate recede from its disagreement to the amendment of the House, with an amendment which is a substitute for both the Senate bill and the House amendment, and that the House agree to the same.

It was the purpose on the part of the managers of the House to have the agreement between themselves and

the managers on the part of the Senate to state in as clear language as possible that a moratorium be granted to the insurance business from the operation of the act of July 2, 1890, as amended, known as the Sherman Act, and the act of October 15, 1914, as amended, known as the Clayton Act, and the act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, until January 1, 1948, leaving the taxing and regulatory powers of the several States fully protected.

The principal difference between the conference report and the bill as it passed the House lies in the inclusion of the act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, in the moratorium provision, and making clear the intention of the Congress that the acts of boycott, coercion, and intimidation are subject to the operation of the suspended statutes even during the moratorium period.

Hatton W. Sumners,
Francis E. Walter,
C. E. Hancock,
Managers on the part of the House.